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MASSACHUSETTS REPORTS

184

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

JUNE 1903 — JANUARY 1904

HENRY WALTON SWIFT

REPORTER

BOSTON

LITTLE, BROWN, AND COMPANY

1904

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OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. MARCUS PERRIN KNOWLTON, CHIEF JUSTICE.

HON. JAMES MADISON MORTON.

HON. JOHN LATHROP.

HON. JAMES MADISON BARKER.

HON. JOHN WILKES HAMMOND.

HON. WILLIAM CALEB LORING.

HON. HENRY KING BRALEY.

ATTORNEY GENERAL.

HON. HERBERT PARKER.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

FRANK L. ALLEN *vs.* INHABITANTS OF MELROSE.

Worcester. February 27, 1903. — June 19, 1903.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Contract, Construction, Performance and breach.

In an action by a sewer contractor against a town for compensation for extra work, the plaintiff is not entitled to recover outside of his contract by showing that the working profiles prepared by the engineer of the town, in accordance with which the work was performed, required deeper excavations than those required by the plans referred to in the contract, if the contract provides that the engineer may make alterations in the grade and that any increase in the amount of work thus caused shall be paid for according to the quantity actually done and at the price established for such work under the contract and fixes the prices for excavations much deeper than those required by the profiles on file at the time of the contract, and it appears that the lowering of the grade required by the engineer was within the terms of the power given him by the contract.

A contract to construct a system of sewers for a town provided that delay on the part of the sewer commissioners in furnishing materials should not give cause for claims for damages but that the time for completing the work should be so far extended as the engineer should judge necessary to compensate for such delay, and that alterations made in the form of the materials should be paid for at the price established for such work under the contract. In an action on this contract, it appeared, that there was a delay on the part of the defendant in furnishing sewer pipe and that the plaintiff was ordered by the defendant's

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engineer to lay the sewer of brick until the pipe arrived. A claim was made by the plaintiff for damage caused by the delay and for the expense of getting ready to lay the brick. *Held*, that the plaintiff could not recover on this item, as under the contract there could be no claim for damages for delay in furnishing the sewer pipe and the contract price for the masonry included the expense of getting ready.

CONTRACT, with a first count setting forth a contract in writing for the construction of a system of sewers for the defendant claiming compensation thereunder and for extra work, and a second count upon an account annexed. Writ dated February 17, 1897.

In the Superior Court the case was heard by *Gaskill*, J., without a jury. By agreement of parties the case was submitted upon an auditor's report, a stenographer's report of the evidence taken before the auditor, and certain exhibits. The defendant made thirty-seven requests for rulings, some of which were given by the judge, others refused, and others modified or given in part. The judge found for the plaintiff in the sum of $9,236.36; and the defendant alleged exceptions.

G. L. Mayberry & F. L. Washburn, for the defendant.

H. L. Parker, for the plaintiff.

HAMMOND, J. 1. The principal question in this case arises upon the charges set forth in the bill of particulars marked "D," and annexed to the plaintiff's declaration.

After the execution of the contract and before the work was begun, the engineer concluded to lower the grade of the sewer at its outfall into the metropolitan sewer one and seven tenths feet. The original profile plans of the sewer, which were made before the contract was signed, did not give the exact distances of the sewer below the surface of the ground, but gave the distances above a base line or "datum plane" fixed and customarily used in such work. As the work progressed it was necessary for the engineer to prepare working profiles for the use of the contractor. In making these working profiles, the engineer made the sewer one and seven tenths feet deeper at its outlet into the metropolitan sewer than as shown upon the original profiles, and made a corresponding increase in depth in the main trunk lines, the additional depth growing less and becoming nothing at the upper end of the trunk lines, and made corresponding changes in some of the lateral sewers which

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ran into these main lines. At other points in the lateral sewers the direction of the sewers was slightly changed, and in some cases the sewers were laid less deep and in others deeper than the original profiles indicated.

The work was performed in accordance with these working profiles. The plaintiff offered evidence tending to show that this lowering of the grade of the sewers necessitated the excavation of several thousand cubic yards of material more than was required by the plans referred to in the contract; that most of this material was fine quicksand under water, and this extra excavation was thereby rendered very expensive. And he contended that the change in grade was so radical and extensive as not to be covered by the terms of the contract, and that he was entitled to a fair compensation for this extra excavation regardless of the prices fixed by the contract. The bill of particulars marked "D," with the exception of item 17, which has been disallowed, sets out the amount claimed by the plaintiff for this work, in addition to the contract prices. The defendant contended on the contrary, that this change was fairly within the terms of the contract, and that the contract prices were applicable to it. The judge sitting without a jury "found" that this departure from the original plans was a change of the sewerage system, refused to rule that the plaintiff could not recover any of the items set forth in D, and found for the plaintiff upon them (except the 17th) in the sum of $3,585.47.

The real question is whether such a change in the plans was fairly within the terms of the contract. If it was, then the contract price must govern, and nothing can be recovered upon the claims set forth in D. It is a question of construction.

The contract was for the construction of certain sewers in the town of Melrose, an inland town, and it evidently covered a large territory. Under it were constructed sewers in forty-one different streets, and the length of sewer pipe laid exceeds five miles. The outlet of the system was the metropolitan sewer. The sewage was to be collected in the various branches, carried to the main trunks, and finally to the outlet, by gravitation. For this it was necessary that there should be a gradual fall in the grade. The advertisement for proposals contains an estimate

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of the amount of excavation at a depth not exceeding eight feet, at a depth between eight and twelve feet, and so at various depths down to twenty feet, and also an estimate of the sizes and lengths of the pipes required and of the other things about the sewer, but it is expressly stated that these estimates are to be considered "as approximate only, and are given merely as a basis for comparison of bids, and the right is expressly reserved of increasing or diminishing the same, as the engineer may deem necessary." In his proposal in response to this advertisement, the plaintiff did not propose to do the work for one round sum, but to do the excavation at given prices according to the various depths; and as to the other matters the same course was pursued. The contract followed the same plan. It is expressly stated therein that the estimates contained in the advertisement calling for proposals are only approximate, and the plaintiff agrees to "do everything required to build and to put in complete working order the said sewers and all structures appertaining thereto, in accordance with the plans on file in the office of the engineer of said town, the lines, levels, and grades, and the requirements and directions in relation to the same, given the contractor from time to time by said engineer." The contract further provides that "the engineer may make alterations in the line, grade, plan, form, dimensions, or material of the work herein contemplated, either before or after the commencement of construction. If such alterations diminish the quantity of work to be done, they shall not constitute a claim for damages, or for anticipated profits on the work that may be dispensed with; if they increase the amount of work such increase shall be paid for according to the quantity actually done, and at the price established for such work under this contract." The contract then fixes the price per cubic foot for excavation between the various grades. Prices are expressly fixed in this way for the excavation between the surface of the ground and eight feet below, between twelve and sixteen feet below, and so on, the last being between twenty-six and thirty-two feet, the prices increasing with the depth. It appears from the final estimate of the work actually done that even at the grade as finally established by the engineer, which at the lower end of the sewer was one

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and seven tenths feet below the grade shown by the plans at the time the contract was made, there was no excavation below a depth of twenty feet, and less than five hundred cubic yards at a grade below sixteen feet. It fairly may be assumed therefore, that both parties understood that, unless either by lowering the grade or by changing the route of the pipes changes were made in the depth of the excavations, there could be no occasion for providing a price for excavation to the depth of thirty-two feet.

In view of the language of the advertisement and of the proposal, the nature of the undertaking, the importance of properly adjusting the grade of pipes through which the sewage was to be carried by gravitation to the outlet the grade of which seems to have been fixed, the comparatively slight changes in grade permitted by the conditions, the express provision that the engineer might "make alterations in the line, grade, plan, form, dimensions, or material of the work herein contemplated, either before or after the commencement of construction," the fact that by the contract prices were fixed for excavations to a depth much greater than that required by the profiles on file at the time of the contract and that the price was to be according to the number of cubic yards and to the depths, we are of opinion that this was not simply a contract to do the work required by the plans on file at the time it was made, but was a contract to do the work as that plan then was or might thereafter be changed, within the limits permissible under the physical conditions and within the general scope of the system, in accordance with the power expressly given to the engineer, and that the lowering of the grade by him was within the terms of the power.

There is a plain distinction between this case and cases like *Wood* v. *Fort Wayne*, 119 U. S. 312, upon which the plaintiff largely relies. In that case it was held that even if the changes were authorized by the contract, "the contract fixes no special rate for laying the pipe under the river, and it cannot fairly be said that there was any contract rate for work of the class of that done" in making the change. Here the contract expressly provides prices for excavations of the kind for which the plaintiff seeks to recover. The evidence did not warrant a finding

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that the change was not within the contract. It follows that the contract fixed the price of this work, and the request that the plaintiff could not recover anything on this branch of the case should have been given.

The judge found for the plaintiff upon items 1 and 2 in the bill of particulars marked "B." These items were charges for work done in taking up and relaying some pipes on Main Street. As to this the defendant asked the judge to rule that the plaintiff was bound by his contract and was not entitled to extra compensation for the work. We think that this exception raises simply the question whether the plaintiff is entitled to extra compensation for this work. If he was, then so far as respects this exception the finding should stand regardless of the question whether the pleading properly states the claim. It is true that at the close of the evidence the defendant asked for a ruling that there could not be a recovery upon any of the items contained in this bill of particulars, but we do not understand that as to these two items it intended to raise any question not specifically named in this first ruling.

Upon the evidence the judge might have found that the pipes were originally laid in a proper way and at the proper grade; that for some cause due in no respect to any act or failure of contractual duty on the part of the contractor, the pipes had settled so that it became necessary to take them up, to put in a new foundation and to relay the pipes; and by the order of the engineer this was done. Upon such a finding we think that, to the extent of the work below grade at least, it comes within specifications 4 and 13 of the contract, and that as to this part it is not work which has become "damaged from any cause" within the meaning of specification 80. Since some portion of the work was within the contract, the ruling requested was properly refused.*

Item 12 of the bill of particulars marked "B," was for "damage caused by delay of 20-in. pipe, and getting ready for brick sewer." As to this it appeared that during the progress of the work there was a delay by the defendant in furnishing sewer pipe, and the plaintiff was ordered by the engineer to lay the sewer of

* The decision on this point depended wholly on the special provisions of the contract.

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brick until the pipe arrived; that he made preparations to lay and did lay something like two hundred feet of the brick sewer at an extra expense to himself, as alleged in this item, before the arrival of the sewer pipe. We understand this not to be a claim for compensation for laying the brick, but for damage caused by the delay and for the expense of getting ready to lay the brick. It is expressly provided in the contract that "delay on the part of the commissioners, in furnishing materials, is not to give cause for claims for damages, but the time for completing the work shall be so far extended as the engineer shall judge necessary to compensate for such delay." It is also provided that alterations made in the form of the materials shall be paid for at the price established for such work under the contract. Inasmuch as the contract price for the masonry includes the expense of getting ready, and as there can be no claim for damages for delay in furnishing the sewer pipe, the ruling that the plaintiff could not recover upon this item should have been given.

As to the claim set forth in the bill of particulars marked "F," the defendant contended that the plaintiff could not recover because an engineer's certificate had not been furnished him as required by the contract. It is plain from the action of the judge upon the requests given that he must have found that this provision of the contract had been waived. Without going over the evidence in detail, it is sufficient to say that we are of opinion that the evidence warranted the finding.

Except as hereinbefore stated, we see no error in the manner in which the court dealt with the various requests for ruling. The result is that the exceptions are sustained as to item 12 in the bill of particulars marked "B," and as to the items contained in the bill marked "D," and all others are overruled.

So ordered.

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W. SCOTT GARCELON *vs.* COMMERCIAL TRAVELERS' EASTERN ACCIDENT ASSOCIATION.

Suffolk. March 3, 1903. — June 19, 1903.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Fraternal Beneficiary Association. Contract. Pleading, Civil, Declaration. *Words,* "Loss of an arm."

If the holder of a certificate of a fraternal beneficiary association is entitled to an indemnity of a definite sum of money under the terms of his certificate payable out of a disability assessment levied upon the members of the association, he may recover the amount in an action of contract against the association for a breach of its implied agreement to levy the assessment.

In an action against a fraternal beneficiary association for a failure to levy a disability assessment out of which an indemnity is payable to a member under the terms of his certificate of membership, the cause of action is a breach of contract, and allegations in the declaration as to bad faith, fraudulent purpose and unlawful action on the part of the defendant do not make it a declaration in tort or in contract or tort.

The amputation of an arm about four inches below the elbow is the loss of an arm within the meaning of a certificate of a fraternal beneficiary association agreeing to indemnify the holder for such a disability.

CONTRACT, against a fraternal beneficiary association incorporated under St. 1894, c. 367, to recover $2,500 as indemnity for the loss of an arm from a railroad accident. Writ dated March 18, 1901.

The amended declaration alleged, that the defendant was organized for the purpose of providing indemnity for its members in case of accident, the membership being limited to commercial travellers, that the plaintiff was a commercial traveller and a member in good standing, that by the certificate of membership the defendant agreed with the plaintiff that if he "shall suffer disability caused by external, violent and accidental means, which shall leave upon the body of said member an external and visible mark, the said association, in accordance with the provisions of its by-laws, within sixty days from the receipt by its board of directors of proof satisfactory to said board of the particular disability suffered by said member, will, from the amount realized from one disability assessment of $2 levied upon each member of said association, pay to said member whose name is above

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written, indemnity as follows, that is to say: . . . For the loss of one leg, or one arm, or for an injury which alone, in the judgment of a competent surgeon selected by the board of directors, has caused total disability, rendering said member unable to perform any duties or follow any occupation for a period of not less than two years, and who shall have been, by said board, adjudged to be permanently totally disabled, one half the amount realized from said assessment, not to exceed the sum of $2,500. . . .

"Provided, that any loss above named shall have occurred within three calendar months after the accident which caused it; and provided further, that the word 'loss' as applied to arm or leg is hereby construed and agreed to mean actual amputation."

That on or about October 18, 1900, the plaintiff, while in the exercise of due care, accidentally fell between the cars of a moving train, and the wheels of one of the cars passed over his left arm and crushed and cut it nearly in two, so that it was necessarily and actually amputated forthwith, at a point about four inches below the elbow, and that wholly through these external, violent and accidental means the plaintiff received injuries which resulted in the loss to the plaintiff of his left arm, and caused his permanent and total disability.

That at the time of the accident and disability, and thereafter, there were thirty-five hundred members of the defendant, legally bound to pay and willing and able to pay a disability assessment of $2 each, for the purpose of paying to the plaintiff the money to which he was entitled under the terms of the agreement and certificates, and that if the defendant or its directors had levied a disability assessment of $2 on each member for such purpose it would have received therefrom the sum of $7,000.

And further that at the time of the accident and disability, and thereafter, the defendant had funds on hand to an amount in excess of $2,500, raised by disability assessments theretofore levied, which it could lawfully apply to the payment of the plaintiff's claim for disability.

That the loss of his arm caused the plaintiff total disability, and there was due the plaintiff from the defendant by reason of the accident, loss of arm and total disability one half the amount, not exceeding $2,500, which the defendant would have received from levying the disability assessment of $2 on each member,

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and that if the assessment had been levied the defendant would have received $7,000 therefrom.

That the defendant and its board of directors were satisfied by proofs of the plaintiff and otherwise that by reason of the accident and loss of arm he had been caused total disability, rendering him unable to perform any duties or follow any occupation whatsoever at any time thereafter, and had been thereby totally disabled.

That the defendant and its board of directors, acting in bad faith and for the purpose of cheating and defrauding the plaintiff, unlawfully and without right refused and failed to have a competent surgeon pass judgment upon the disability of the plaintiff or to adjudge the plaintiff to be permanently totally disabled, or to levy any disability assessment for the purpose of paying the plaintiff, or for any purpose whatever, or to pay the plaintiff, for or on account of the accident, loss of arm and disability, any money whatsoever.

The defendant demurred, assigning the following causes of demurrer: "First. Because in the amended declaration counts in contract and in tort are improperly joined. Second. Because the amended declaration shows that the plaintiff has not lost his left arm. Third. Because the amended declaration does not set forth any contract between the plaintiff and the defendant whereby the defendant has agreed to pay the plaintiff as indemnity for the loss of an arm any fixed or definite sum of money. Fourth. Because the amended declaration shows that if the defendant is liable to pay the plaintiff any sum as indemnity for the loss of an arm, the defendant is and can only be liable to pay the plaintiff one half of the amount realized from one disability assessment levied by the defendant upon its members, and the amended declaration does not allege that the defendant has levied such an assessment. Fifth. Because the amended declaration does not allege that each of the thirty-five hundred members, who are therein alleged to have been at the time of the alleged injury to the plaintiff legally bound to pay, and able and willing to pay, a disability assessment of $2, for the purpose of paying to the plaintiff money, would in fact have paid such assessment so levied by the defendant."

In the Superior Court the case was heard by *Bishop*, J. upon

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the demurrer to the amended declaration. He made an order sustaining the demurrer from which the plaintiff appealed, and the judge, being of opinion that the matter ought to be determined by this court, reported the case for such determination, ordering a stay of all further proceedings except such as might be necessary to preserve the rights of the parties.

F. P. Cabot, for the plaintiff.

W. F. Merritt, for the defendant.

BARKER, J. 1. Both before and since the statement in *Burdon* v. *Massachusetts Safety Fund Association*, 147 Mass. 360, that under a policy like that now in suit, "it may be that an action at law would lie; but the more appropriate remedy would be by a proceeding in equity to compel the association to lay the assessment," actions at law have been entertained in our courts upon similar policies. The fact that a plaintiff at law has another remedy in equity to which he might resort is not, commonly at least, a defence to his action at law. We think the policy sued on contains an implied contract on the part of the defendant that under the circumstances alleged it will levy an assessment, and that sufficient facts are alleged in the declaration to show a breach of that contract and that upon the admission as true of the allegations the plaintiff is entitled to judgment for the sum of $2,500.

2. The declaration is in contract, and the allegations as to bad faith, fraudulent purpose and unlawful action on the part of the defendant make it neither a declaration in tort nor a declaration having one count in contract and one in tort.

3. We consider the amputation of an arm a little below the elbow to be the loss of an arm in the common acceptation of those words and within their meaning as used in the policy, which specifies merely the "loss of an arm" without mentioning whether the loss is by amputation below or above the elbow joint.

In our opinion the demurrer should have been overruled, and the case is remanded to the Superior Court with directions to reverse the order sustaining the demurrer and to enter an order overruling it.

So ordered.

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JOHN S. FULLER, trustee, *vs.* NEW YORK FIRE INSURANCE COMPANY.

SAME *vs.* FARMERS' FIRE INSURANCE COMPANY.

SAME *vs.* FIREMEN'S INSURANCE COMPANY.

SAME *vs.* TRADERS' INSURANCE COMPANY.

SAME *vs.* GREENWICH INSURANCE COMPANY.

SAME *vs.* INDIA MUTUAL INSURANCE COMPANY.

SAME *vs.* MILLERS' AND MANUFACTURERS' INSURANCE COMPANY.

Berkshire. March 4, 1903. — June 19, 1903.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Bankruptcy. Insurance, Fire. Words, "Condition."

An insurance policy on property of a bankrupt, containing the usual clause requiring the written consent of the insurer in case of assignment, is property which prior to the filing of the petition the bankrupt could have transferred within the meaning of § 70 of the bankruptcy act of 1898, and vests in the trustee in bankruptcy upon his appointment and qualification.

One holding a fire insurance policy filed a voluntary petition in bankruptcy and was adjudicated a bankrupt. A week later a receiver of his estate was appointed and afterwards on the same day the insured property was destroyed by fire. Six weeks later a trustee in bankruptcy was appointed who brought an action on the policy. The defendant contended that the bankrupt had ceased to have an insurable interest in the property at the time of its loss, and also that by the petition and adjudication the property was assigned without the assent of the insurer. *Held*, that the title to the property remained in the bankrupt until its destruction by fire when a right of action vested in the bankrupt which passed to the trustee upon his appointment and qualification.

A rider on a policy of fire insurance in the Massachusetts standard form contained the following provision: "It is understood and agreed that the Automatic Sprinkler System is in complete working order and in further consideration of reduction in rate it is hereby made a condition of this policy that the assured shall use due diligence that such equipment shall continue to be maintained in complete working order during the full term of this insurance." *Held*, that this stipulation was neither a warranty nor a condition precedent, but was a representation, a breach of which would be a matter of defence to be shown by the insurance company.

SEVEN ACTIONS OF CONTRACT by the trustee in bankruptcy of the estate of Charles E. Callender, against seven different

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insurance companies, each upon a policy of insurance against fire in the Massachusetts standard form with the rider quoted by the court. Writs dated October 8, 1900.

In the Superior Court the cases were tried before *Fox*, J. In each case the jury returned a verdict for the plaintiff. The defendants alleged exceptions.

Among the defendants' requests for rulings refused by the judge were the following, which are referred to by the court but not stated: "2. The filing of the petition in bankruptcy by Mr. Callender and the adjudication thereon constituted a sale of the insured property within the meaning of the policy which rendered the policy void and the plaintiff is not entitled to recover. 3. The property insured was sold during the term of the policy and without the assent in writing or in print of the defendants and the policy was thereby rendered void and the plaintiff cannot recover. 4. The filing of the petition in bankruptcy by Mr. Callender and the adjudication thereon operated to divest him of all insurable interest in the property as of the date of the adjudication, so that, at the time of the loss, Mr. Callender suffered no damage, and had no right of action against the defendants which could pass to the plaintiff, and the plaintiff is not entitled to recover. 5. The policy did not insure the interest of the plaintiff in the property; at the time of the fire Mr. Callender's interest had wholly ceased; there was no interest in the property, other than that of the mortgagee, which was covered by the insurance and the plaintiff is not entitled to recover for the mortgagee. 6. The policy was assigned before the alleged loss and without the assent in writing or in print of the defendants, and the assignment rendered the policy void and the plaintiff cannot recover. 7. The filing of the petition in bankruptcy by Mr. Callender and the adjudication thereon operated as an assignment of the policy, as of the date of the adjudication; to this assignment the defendants never assented in writing as provided in the policy thereby rendered void and the plaintiff cannot recover."

The other requests for rulings refused by the judge are stated or explained in the opinion.

F. W. Brown, (*G. L. Huntress* with him,) for the defendants.

A. C. Collins, for the plaintiff.

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BARKER, J. These actions are in contract upon policies of fire insurance issued to one Callender upon his mill. They were tried together and with a verdict for the plaintiff in each case. On March 2, 1900, Callender filed a voluntary petition in bankruptcy and was adjudicated a bankrupt. On March 10, 1900, at 12.30 o'clock P. M. a receiver of the bankrupt's estate was appointed and at 7.45 P. M. on the same day the insured property was destroyed by fire. On April 23, 1900, the plaintiff was appointed trustee in bankruptcy, and thereafter brought the actions.

One exception was to the introduction of evidence. Although this exception is stated in the defendants' brief it has not been argued by them and we treat it as waived.

Sixteen requests for rulings to the jury were made by the defendants, and the other exceptions relate to the requests.

The policies were of the Massachusetts standard form, and upon each was a rider containing the following clause: "It is understood and agreed that the Automatic Sprinkler System is in complete working order and in further consideration of reduction in rate it is hereby made a condition of this policy that the assured shall use due diligence that such equipment shall continue to be maintained in complete working order during the full term of this insurance."

The defendants contended that they were not liable because the terms of this clause had not been complied with; that the burden of showing compliance with both parts of the clause was upon the plaintiff. They also relied upon alleged breaches of the usual conditions against failure fairly to represent the material facts and circumstances, against change of situation or circumstances affecting the risk, and against a sale of the property or an assignment of the policy, and the requests for instructions were addressed to the questions arising under these various defences.

The arguments of the defendants' brief are embraced in two classes, first those founded upon the effect of the bankruptcy proceedings upon the contracts evidenced by the policies, and second those founded upon the rider concerning the sprinkler system.

One contention is that neither the policies nor any right of

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action upon them passed to the plaintiff as trustee in bankruptcy. But the policies were in their nature assignable and while failure to obtain the written consent of the insurers might defeat the policies it would not render their transfer invalid. *Hewins* v. *Baker*, 161 Mass. 320. Therefore they were property which prior to the filing of the petition the bankrupt could have transferred, and so were a kind of property enumerated in § 70 of the bankruptcy act as vested by operation of the law in the trustee upon his appointment and qualification. The proviso of the section dealing with insurance policies which have a cash surrender value payable to the bankrupt, his estate or personal representatives is an implication that all insurance policies are property which it is the intention of the section shall vest in the trustee. But whether the policies passed to the plaintiff would be immaterial if the fire created a chose in action to recover for the loss and if such right of action passed to the plaintiff.

The next contention is that upon the adjudication that Callender was a bankrupt he ceased to have an insurable interest in the property. But neither the policies nor the insured property vested in the trustee at the time of the adjudication. The insured property never vested in the trustee because it was not in existence at the time of his appointment and qualification. The title to it remained in Callender until it was destroyed by fire, as also did the title to the policies. Hence the destruction of the property changed or ripened the conditional obligation of the insurers into a fixed obligation to pay the amount of indemnity stipulated for in the policy. To hold that this ripening of the obligation made it after acquired property which would not vest in the trustee, but which the bankrupt could hold as his own, would be as absurd as to hold that if goods which he had at the time of adjudication were converted by a stranger to his own use between the time of the adjudication and the appointment of the trustee the right to maintain trover for their value would not pass to the trustee, but might be enforced by the bankrupt as after acquired property.

If an unmatured obligation on which there was no right of action at the date of adjudication should mature between it and the appointment of the trustee the right of action upon

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it would be one which did not exist until after the adjudication, but there can be no doubt that it would vest in the trustee. In all such cases the new right of action may be compared to a fruit which has grown and ripened during the period of transfer and which being upon the branch at the moment when the property vests in the new owner becomes his. The statute is to be construed in view of its general purpose of applying the property and rights of debtors for the benefit of their creditors, and while the debtor's property vests as of the date of the adjudication it yet has the incidents which have become attached to it up to the time when it vests in the trustee upon his appointment and qualification. Even if the change wrought in the ownership of the policy will, if the insurer does not assent in writing to the transfer, make the policy void as to future losses, it does not make void the matured obligation to pay for a loss incurred before the time when the ownership of the policy was changed. The same considerations dispose of the contention that the adjudication and the appointment of a receiver before the fire violated the right of the insurer to have the insured property cared for by Callender. He was still the owner of the property and in its actual control and the rights and obligations of the receiver tended to add to and not to diminish the care and oversight of the insured property and could in no way increase the risk or alter it to the detriment of the insurers. As to the supposed interest of the trustee to turn the insured property into money by getting its value from the insurers, it is enough to say that up to the time of the fire there was no trustee. Nor was the interest of Callender in the insured property after the adjudication and up to the time of the fire a new or different interest from that which he had up to the time of the adjudication. No change of title was effected until the appointment and qualification of the trustee, and there was until then no change in the legal relation of Callender to the property.

Nor is there any impossibility of compliance with the provisions for proof of loss, or anything resulting from the bankruptcy of Callender which works a release of the insurers from their obligation because of those provisions. If the insured dies at the same time when the loss occurs no proof of loss can be

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made by him personally, but such a death would not discharge the insurer from liability. In the present cases the bill of exceptions states that proofs of loss were duly filed by the plaintiff.

As the insured property was destroyed by fire before the bankrupt's estate became vested in the trustee there was no sale or transfer of it, during the term of the policy and without the assent of the insurers and so no defence under the conditions of the policies relating to such sales, and no alteration of the situation or circumstances affecting the risk growing out of the bankruptcy. These considerations show that there was no error in the refusal to give the second, third, fourth, fifth, sixth and seventh requests.

The exception to the refusal to give the eighth request that the plaintiff was not entitled to recover interest before the date of the writs has not been argued and we treat it as waived.

Of the requests concerning the rider and the sprinkler system the defendants have argued only those relating to the eleventh and twelfth requests. The thirteenth request was given in terms and the fourteenth and sixteenth were covered by the charge in a manner sufficiently favorable to the defendants. As the exceptions relating to the ninth, tenth, fourteenth, fifteenth and sixteenth requests have not been argued by the defendants we consider those exceptions as waived.

The eleventh request was as follows: "The burden is on the plaintiff to show

a. That the sprinkler system was in complete working order at the time the policy was taken out.

b. That he used due diligence to maintain the sprinkler system in complete working order during the entire time from the date of the policy to the time of the fire."

The judge gave the instruction that the burden of proof was upon the plaintiff to show that the system was in complete working order at the time the policy was taken out, but refused the second clause of the request and instructed the jury that the burden was on the defendants to show that the plaintiff failed to use due diligence to maintain the system in complete working order after the policy had taken effect.

"There is undoubtedly some difficulty in determining by any

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simple and certain test what propositions in a contract of insurance constitute warranties." Shaw, C. J. in *Daniels* v. *Hudson River Ins. Co.* 12 Cush. 416, at page 423. The truth of or compliance with a warranty on the part of the assured is a condition precedent to his right to recover which the burden is upon him to prove in an action upon the policy. *McLoon* v. *Commercial Ins. Co.* 100 Mass. 472, 474. *Campbell* v. *New England Ins. Co.* 98 Mass. 381, 389, 390.

In the case last cited it is said that whether a proposition is a warranty "will depend upon the form of expression used, the apparent purpose of the insertion, and sometimes upon the connection or relation to other parts of the instrument." As in other cases involving the construction of contracts the language used is to be considered in view of the general purpose of the contract and of the situation of both parties. As was said in *Daniels* v. *Hudson River Ins. Co.*, *ubi supra*, "the leaning of all courts is, to hold such a stipulation to be a representation, rather than a warranty, in all cases, where there is any room for construction; because such construction will, in general, best carry into effect the real intent and purpose which the parties have in view, in making their contract."

In the present instance it is to be noted that the rider, the language of which was chosen by the insurer, does not contain the word "warrant" or "warranty." The precise word used is "condition," and in the body of the policy were other stipulations or conditions, none of which were technical warranties. It is also to be noted that the language of the rider cannot be taken with absolute literalness. It begins by stating that it is "agreed" that the system is in complete working order. An agreement assumes that both parties assert to be true the fact stated as agreed. Yet the defendants did not intend to assert or agree on their part that the system was then in order. Again, the full term of the insurance was one year. A loss might happen during the first day of the term, and it would be absurd to contend that if so the insured could not recover for it without showing that he had used due diligence to keep the system in order during the remainder of the year.

While the rider makes due diligence on the part of the insured to maintain the system in complete working order a con-

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dition of the policy, it does not say in express words that the use of such diligence shall be a warranty or a condition precedent, or a condition differing in legal character from the other conditions so called in the policy. The most important effect of construing the clause in question as a warranty, inasmuch as the insurers cannot be made to pay for a loss if the insured fails to use due diligence, is upon this very question of the burden of proof. Assuming that both parties knew the law upon this question, an assumption easily made as to the insurers at least, we think it unlikely that the insurers would demand that the insured should be bound to prove as a condition precedent to any right to recover that he had used due diligence in the particular referred to, or that the insured would agree to assume that unusual burden. Upon the whole we think that the parties did not intend the rider either as a warranty or a condition precedent to the right to recover for a loss but as a condition similar in effect to the other expressed conditions a breach of which the insurer might set up in defence and prove.

If so, the refusal to give the second clause of the eleventh request, and the instruction given in lieu of it was right.

The next exception is to the refusal to give the instruction that there was no evidence that the sprinkler system was in complete working order when the policy was issued.* The policies to which the request referred were issued at different dates in the months of June, August and December before the occurrence of the fire. Without stating at length the evidence, it is enough to say that there was evidence that the system had been installed and put in complete working order before the date of the earliest policy, and that it was inspected and repaired with such frequency as to justify a finding that it was in complete working order at the date when each policy was issued.

The defendants' brief contends that whether reasonable diligence had been exercised was a question of law and that the judge erred in submitting it to the jury. To what exception stated in the bill this contention is addressed it would perhaps be difficult to say. Assuming that it is open upon the bill, the doctrine of our court is that where the evidence is "doubtful or

* The twelfth request.

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conflicting, and where, upon the view of it most favorable to the plaintiff, the court would find due diligence" the case may be left to the jury. *Parker* v. *Middlesex Mutual Assur. Co.* 179 Mass. 528, 532. Examining the evidence as stated in the bill we think the judge properly could submit the question to the jury.

The remaining exception is to the refusal to give the first request, that upon all the evidence the plaintiff cannot recover.

The defendants' brief contains no argument expressly directed to this exception, and none which we think makes in support of it except those which we have considered and disposed of in dealing with the other exceptions. Certain statements are made in the defendants' brief as to a payment by the insurers of the mortgage upon the insured property, which do not appear in the bill of exceptions and concerning which it does not appear that any question was raised at the trial.

Exceptions overruled.

JOHN F. DOWNEY *vs.* CITY OF BOSTON.

Suffolk. March 5, 1903. — June 19, 1903.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Municipal Corporations. Negligence.

In an action at common law against a city for personal injuries, it is no evidence of negligence on the part of the city, that its employees engaged in laying a water main left temporarily on the sidewalk of a public street an iron pipe from one to two feet in diameter and ten or twelve feet long two or three inches from the curbstone and parallel with it.

TORT at common law by a boy for injuries alleged to have been caused by the negligence of the agents and servants of the defendant in placing and leaving on the sidewalk of Havre Street, in that part of Boston called East Boston, a section of iron pipe which rolled upon the plaintiff's arm, with a second count alleging that the pipe was rolled upon the plaintiff by certain children striking their feet against it. Writ in the Municipal Court of the City of Boston dated October 28, 1901.

On appeal to the Superior Court the case was tried before

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Pierce, J. It appeared that the plaintiff received his injuries on June 13, 1901, about 5.15 P. M., while attempting to pick up a cent which he had dropped into the gutter.

There was evidence tending to show that the plaintiff was a minor, five and a half years old at the time of the accident; that Havre Street was a public street, lined for the most part with tenement houses; that the defendant by its employees was laying a new water main in the street and had dug a trench through the street for this purpose; that the earth was thrown aside and planks laid down over the trench opposite the place of the accident, for people to cross the street; that the sidewalk at this point was constructed of brick, with a stone curbing, and sloped toward the gutter; that some time before the accident, the defendant's employees had placed iron water pipes from one to two feet in diameter and ten or twelve feet long, along the gutter of the street adjacent to the plaintiff's home, and had placed one also on the sidewalk two or three inches from the curbstone and parallel with it; that the plaintiff with a cent in his hand started to cross the street to a candy store in the basement of the building opposite; that he dropped his cent between the curbstone and the iron pipe in the gutter; that he lay upon his stomach on the pipe in the gutter with his left arm in the gutter trying to reach the cent, and while so doing, the pipe on the sidewalk rolled upon his left arm and broke it. A witness testified that there were two little children on the sidewalk, each standing with a foot on the pipe when it started to roll.

The judge ruled that the plaintiff could not maintain this action and ordered a verdict for the defendant. The plaintiff alleged exceptions.

E. O. Achorn, for the plaintiff.

A. L. Spring, for the defendant, submitted a brief.

BARKER, J. In our opinion the jury could not be permitted to find negligence on the part of the defendant from the evidence. The work of laying water pipes necessarily involved the digging up of the street and the use of its surface to a greater or less extent for the deposit of dirt from the trench and as a place of temporary storage for pipes and other materials and implements. Suitable places for travel seem to have been arranged

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and it could not be expected reasonably that travellers would attempt to stand or walk upon the pipes, and considering their weight and size we think there was no reasonable cause to expect that a pipe left on the sidewalk parallel with the curbing and three inches from the gutter, at a point in the street where it was not arranged for travellers so to walk as to come in contact with the pipe would be dangerous.

We think it unnecessary to consider the question of the plaintiff's due care or negligence or that of the effect of the acts of the other children in setting the pipe in motion.

Exceptions overruled.

SAIMAN SIRK *vs.* WILLIAM H. EMERY & another.

Middlesex. March 5, 6, 1903. — June 19, 1903.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Contract, Performance and breach. *Witness. Evidence*, Of value of land.

In an action for a failure to deliver a deed of real estate purchased by the plaintiff at auction, it appeared, that by the agreement of sale the plaintiff, who had made a deposit, was bound to call at the office of the auctioneer within thirty days of the sale and be prepared then and there to take the deed and pay the balance of the purchase money, that three days after the sale the plaintiff requested the auctioneer to have the deed ready for him, and said that he would call for it in a few days, that five days later, after giving notice by telephone, the plaintiff with his attorney and two clerks came to the auctioneer's office and the attorney demanded the delivery of the deed to the plaintiff, saying "and here is your money." The auctioneer was not present and a clerk replied that the deed was not ready. The jury were instructed that the plaintiff must satisfy them that at the time of his demand he had with him a sufficient amount of money for the deed. The jury found for the plaintiff in a substantial amount. *Held*, that the question of the plaintiff's readiness to perform was a question of fact for the jury and was submitted to them properly.

In accordance with the well settled practice of this Commonwealth, evidence may be introduced to contradict the testimony of a witness of the adverse party as to a conversation without having called the attention of the first witness to the conversation.

In order to show the value of certain land evidence of a sale of other land may be admitted but not of the value or the assessed valuation of the other land.

CONTRACT, by the highest bidder at an auction sale of certain real estate in Lowell known as the Merrimack House property,

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for the defendants' failure to deliver a deed of the property. Writ dated September 25, 1901.

At the trial in the Superior Court *Aiken*, J. refused to give the instructions requested by the defendants. The jury returned a verdict for the plaintiff in the sum of $12,000; and the defendants alleged exceptions.

F. N. Wier, (*G. R. Richardson* with him,) for the defendants.

F. E. Dunbar, for the plaintiff.

HAMMOND, J. The fair interpretation of the agreement is that the purchaser must call at the office of Conant the auctioneer for the deed within thirty days of the sale, and at the time of the call must be prepared then and there to take it and pay for it.

There was no doubt that the plaintiff called for the deed at the place and within the time named in the agreement, but the defendants contended that he was not then ready to pay the purchase money, and at the close of the case they asked for a ruling that there was not sufficient evidence to warrant a finding that at the time of the demand "the plaintiff was prepared to pay the balance of the purchase money, or to pay any sum whatsoever that he might have been called upon to pay at that time."

The judge refused to rule as requested, and submitted to the jury the question of the readiness of the plaintiff to pay for the deed at the time of the demand.

We think that this question was properly submitted to the jury. To begin with, there is nothing in the bill of exceptions which would create a suspicion that the plaintiff was acting in any other than good faith from the beginning. He was persistent in his bidding, and when finally his bids were accepted he was anxious that the time within which the $13,500 note was to be paid should be ten days instead of three, so that he could meet it. Within two or three days of the sale Mr. Spaulding, an attorney hired by him to examine the title, appeared at the auctioneer's office to procure the old deeds which he wanted for use in that work, and asked Conant some questions with reference to the title. The plaintiff testified that on Friday, three days after the sale, he met the auctioneer at the railroad station and had a conversation with him, in which he requested

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that the deed be immediately prepared and written with the name of the plaintiff as grantee, that he would call at the auctioneer's office for it in a few days, and that the auctioneer said he would go at once and instruct the defendant's attorney to prepare the deed in accordance with the request. There was evidence that a few moments before the plaintiff with his attorney appeared at the office and demanded the deed, the plaintiff's counsel telephoned ahead that he and the plaintiff would call at the office within a few moments to take the deed. The plaintiff further testified that on the eighteenth day of September, the eighth day after the sale, after this notice from his attorney had been given, he with the attorney and two of his clerks went to the office of the auctioneer, and that the attorney said to a clerk, "I have come down, and Mr. Sirk has come here to get a deed of the property and here is your money; we want the deed." The reply of the clerk in substance was that the deed was not ready, and the attorney then said that he had been telephoning to them all day to get the deed ready, and that he was coming to take the property. The plaintiff, upon being informed by the clerk that the auctioneer was "away somewhere," said to the clerk that he had notified the auctioneer, and the plaintiff also expressed his surprise that the deed was not ready. It is also evident from the verdict that the bargain would have been a profitable one for the plaintiff. The plaintiff further testified that he never had received any deed from the defendants, and that "they would not answer at all." From the first to the last the conduct of the plaintiff was that of a man who thought he had made a profitable bargain and was intending to carry it through and reap the profits. He knew that he could not have the deed until he paid for it. The evidence, as it appears before us, would warrant a jury in coming to the conclusion that he was fearful that there might be hesitation on the part of the defendants in delivering it to him, and that it would be well for him to take every legal step necessary on his part to hold the defendants to the contract.

With his attorney and two clerks he appeared at the proper time and place, and the attorney asked for the deed, adding the expressive language "and here is your money." The language would seem to indicate some accompanying gesture or move-

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ment in the way of an exhibition or tender of the money; but whether there was such a movement or not, the jury may have properly come to the conclusion that even if there was no exhibition of the money, yet the most reasonable explanation of the conduct of the plaintiff under the circumstances was that he was actually ready to transact the business for which he came, which was to pay the money and take the deed, rather than that he was engaged in an elaborate attempt to put the defendants in default by a pretended readiness on his part. The jury were instructed that the plaintiff must satisfy the jury that at the time of the demand he had with him a sufficient amount of money to pay for the deed. The question of his readiness was a question of fact for the jury, and was submitted to them under proper instructions. The instructions covered sufficiently also the subject matter of the first special request for a ruling.

The evidence of Spaulding was properly admitted. Whatever may be the rule elsewhere, it is the well settled practice in this State to introduce evidence to contradict the testimony of a witness called by the adverse party as to a conversation, without first calling the attention of the first witness to the conversation.

The question put to an expert witness with reference to the Coburn lot was properly excluded. The Coburn lot was not the one the value of which was to be fixed by the jury, and therefore although the sale was admissible to throw light upon the value of the lot in controversy, still the opinion of the witness as to its value or its assessed valuation was not admissible. *Shattuck* v. *Stoneham Branch Railroad*, 6 Allen, 115. *Thompson* v. *Boston*, 148 Mass. 387.

The other exceptions taken by the defendants are waived.

Exceptions overruled.

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PATRICK H. ROONEY *vs.* MARYLAND CASUALTY COMPANY.

Norfolk. March 6, 1903. — June 19, 1903.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Insurance, Against liability. Wairer. Words, "Immediate."

A provision, in a policy of insurance against liability to persons injured by the operation of the business of the assured, that the assured upon the occurrence of an accident shall give immediate notice thereof in writing, is not complied with by a notice in writing mailed twenty-three days after the accident and twenty-two days after it was known to the assured.

If the assured, under a policy of insurance against liability to persons injured by the operation of his business, gives notice in writing of an accident for which he is liable, too late to comply with a condition of the policy requiring immediate notice, and if the notice is addressed to and received by the attorneys of the insurance company who investigate the circumstances of the accident and unsuccessfully try to settle for a small sum with the person injured and ask the assured for a written report of the accident which they receive, and if thereafter they send the notice of the accident to the insurance company which on the next day instructs them to disclaim liability, these facts are no evidence of a waiver on the part of the insurance company of the breach of the condition in the policy requiring immediate notice in writing of the accident, and no evidence of any loss or injury to which the assured was subjected by the course pursued in behalf of the company.

CONTRACT, by a sewer contractor, on a policy of insurance insuring him against loss from common law or statutory liability for damages on account of bodily injuries accidentally suffered by any person or persons not employed by the assured, caused by the negligence of the assured and resulting from the operation of the trade or business described in the application, alleging that the plaintiff had settled an action brought by one Mrs. Gallagher against the town of Hyde Park, and incurred legal expenses connected therewith, for which he was entitled to indemnity under the policy. Writ dated October 31, 1900.

In the Superior Court the case was tried before *Mason*, C. J., who ruled that the action could not be maintained, and subject to the plaintiff's exception directed a verdict for the defendant. At the request of the parties he reported the case for determination by this court. If the rulings reported were right, judgment was to be entered on the verdict; otherwise, judgment was

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to be entered for the plaintiff in the sum of $975 with interest from the date of the writ.

S. H. Tyng, (*E. S. Fellows* with him,) for the plaintiff.

T. E. Grover, (*C. S. Knowles* with him,) for the defendant.

BARKER, J. One stipulation of the policy is that "The assured, upon the occurrence of an accident, shall give immediate notice thereof in writing with full particulars to the home office of the company at Baltimore, Md., or to its authorized agents. He shall give like notice, with full particulars of any claim which may be made on account of such accident."

The accident on account of which the suit is brought happened on November 5, and the plaintiff knew of it on November 6, but the first written notice of it which he sent to any person was his letter of November 28. The only acts which he did tending to give notice before that date was to go to the office of Houston, the person from whom he had received the policy and to whom he had paid the premium, and to tell him that there had been an accident upon the work and to notify a physician. We think that there was no evidence admitted or offered which in view of the state of facts would have justified a finding that the plaintiff had complied with the stipulation that upon the occurrence of an accident he should give immediate notice thereof in writing. His omission to give any written notice whatever for more than three weeks after he had information of the accident distinguishes the case from that of *Mandell* v. *Fidelity & Casualty Co.* 170 Mass. 173, where the assured gave notice four days after receiving information of the accident and eighteen days after it had occurred.

The other question for consideration is that of waiver of the requirement for immediate notice, and with reference to this question the plaintiff's exceptions to the exclusion of evidence though not argued are insisted upon.

The letter of December 1, 1899, from the defendant's Boston attorneys at law to their client was properly excluded as a privileged communication between attorney and client. Those of December 4, 1899, and of October 22, 1901, were properly excluded for the same reason. The letter of May 26, 1900, we assume to have been from the Boston attorneys at law of the defendant to the attorney of the plaintiff and had no tendency

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to show that the writers were acting in any capacity other than that of attorneys at law retained by the defendant to advise them and conduct their defence to the claim made under the policy by the present plaintiff, and the exclusion of the letter worked no detriment to him upon the question of waiver of the required written notice.

The other exception as to evidence is to the exclusion of an offer to show that the defendant's attorneys in Boston had received from it a set of answers to interrogatories filed by the plaintiff prior to the set of answers which were filed in court, and also to show what the contents of the prior answers were, but the offer does not disclose to us what those contents were. The offer we think was rightly excluded, both because it could not be admitted without compelling the disclosure of privileged communications between attorney and client, and because the offer does not show that the evidence would have been material.

The substantial circumstances bearing upon the question of waiver, as shown in the evidence and offer of proof, are that after a complete failure to give immediate notice in writing the plaintiff on the twenty-third day after the accident and the twenty-second day after he had knowledge of it sent a written notice of it to the Boston attorneys of the defendant. The latter received this notice from its attorneys on December 11, and on the next day instructed them to disclaim liability, which was done on December 15 or 16. In the meantime between November 29 and December 7 the attorneys had been investigating the circumstances of the accident and unsuccessfully endeavoring to settle for a small sum with the person injured, and had requested the plaintiff to make to themselves and had received from him a written report of the accident.

In all this we can discover no intention on the part of the defendant to waive the breach of the condition for immediate written notice of the accident and no evidence of any loss or injury to which the plaintiff was exposed or subjected by the course pursued by or on behalf of the defendant. We think the verdict for the defendant was right.

Judgment to be entered on the verdict.

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ANSON STERN *vs.* CLARENCE H. KNOWLTON.

Suffolk. March 6, 1903. — June 19, 1903.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Evidence, Extrinsic as affecting writings, Competency. *Damages*. *Officer*.

In an action by a constable who was a defendant in replevin against another constable for accepting insufficient sureties on the replevin bond, the plaintiff may show by oral evidence that the property replevied was the same which he had attached upon a certain writ placed in his hands for service.

In an action by one who was a defendant in replevin against a constable for accepting insufficient sureties on the replevin bond, the plaintiff may show upon the question of damages the amount which he agreed to pay his counsel for services in the replevin action and in an action on the replevin bond.

In an action against a constable for accepting insufficient sureties on a replevin bond, it is not necessary that the plaintiff should have recovered judgment on the bond, if he brought an action on the bond which failed because the defendants could not be found.

TORT by a constable, who had been defendant in two actions of replevin, against another constable for negligently accepting insufficient sureties on the replevin bonds. Writ in the Municipal Court of the City of Boston dated September 11, 1901.

On appeal to the Superior Court the case was tried before *Hardy*, J., without a jury. The judge admitted certain evidence against the defendant's objection. He refused to rule that the plaintiff could not recover and also refused to make certain other rulings requested by the defendant, and found for the plaintiff in the sum of $525.25. The defendant alleged exceptions.

P. J. Casey, for the defendant.

A. K. Cohen, for the plaintiff.

BARKER, J. The action is in tort to recover from the defendant indemnity for losses sustained in consequence of his negligently taking insufficient sureties upon two replevin bonds taken upon writs which he served as a constable. The action is founded upon the common law and such actions are recognized by our statutes and decisions. See Rev. Sts. c. 113, § 39, and Commissioners' note to same; Gen. Sts. c. 143, § 21; St. 1870, c. 309, § 1; Pub. Sts. c. 184, §§ 18, 27; R. L. c. 190,

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§§ 15, 24; *Ladd* v. *North*, 2 Mass. 514, 516, 517; *Parker* v. *Simonds*, 8 Met. 205; *Pomeroy* v. *Trimper*, 8 Allen, 398, 400; *Carter* v. *Duggan*, 144 Mass. 32. In the case last cited it is held that the measure of damages is not the value of the property replevied but is the amount the plaintiff has lost by reason of the misdoing of the defendant in accepting insufficient sureties. The action is similar in its nature to that against a sheriff for taking insufficient bail. See *West* v. *Rice*, 9 Met. 564. The present action was tried without a jury and with exceptions on the part of the defendant to the admission of evidence and to the refusal to grant requests for rulings.

1. Oral evidence was admitted that the property replevied was the same which the plaintiff had attached upon two certain writs placed in his hands for service. The evidence contradicted no return and was competent upon the question of the identity of the property.

2. The conversation between the plaintiff and defendant admitted under exception was competent to show admissions made by the defendant tending to show that he had acted negligently in taking insufficient sureties upon the replevin bond.

3. The measure of damages being indemnity for the loss which the plaintiff had sustained, evidence of the amount which he had agreed to pay his counsel for services in the replevin actions and the suits upon the replevin bonds was competent, although of course not conclusive upon the question of damages.

4. The first ruling requested and refused was that on all the evidence the plaintiff could not recover on either count. In support of the exception the defendant contends that there was no evidence that the plaintiff had brought action on both bonds. It is true that the plaintiff has not recovered judgment on either bond. But the evidence tended to show that he had brought one suit upon both bonds and that the action failed because the makers of the bond could not be found, so that the writ could not be served.

5. The second request was that the plaintiff himself has no right to sue the defendant on either bond and that the bonds should run to the plaintiff. But this suit is not upon the bonds but upon the defendant's misdoing in taking them, and if, as was not the case, the bonds should have run to the plain-

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tiffs in the actions in which the present plaintiff had attached the goods replevied it would be only an additional reason for holding the defendant liable.

6. The third request is that the bonds are not bonds taken in the capacity of a constable. In support of the exception the defendant contends that the declaration does not allege that either bond was "approved by the defendant as a constable *pro forma*" and "that neither bond is a statutory bond according to the strict requirements of the statute." There was no demurrer to the declaration, and we think that at least after a trial it must be construed as alleging that the defendant approved the bonds in his capacity as a constable as well as seized the goods upon the replevin writs. What is meant in the request by the words "statutory bond" is not clear to us, but certainly it was the defendant's duty to take a good bond with sufficient sureties.

7. The seventh request was that there was not sufficient evidence that there was not property of the sureties that could be attached to satisfy the executions. This we think was a question to be passed upon as a question of fact upon all the evidence, it appearing that the sureties could not be found when sued upon the bonds.

Exceptions overruled.

MARY J. KENNEDY *vs.* LOWELL, LAWRENCE AND HAVERHILL STREET RAILWAY COMPANY.

JOSEPH A. KENNEDY *vs.* SAME.

ANN MCFEE *vs.* SAME.

Essex. March 6, 1903. — June 19, 1903.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Negligence.

If the rail of an electric car track is nine feet from the curbstone of a crowded street and a woman in an open wagon drives to the side of the street for the purpose of going to a shop, and stops with her horse's head at the curb behind a team with the hind wheel of her wagon so near the car track that a car which she sees stopped at a short distance away cannot pass without striking the

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wheel, and the car moving slowly at a pace not faster than a walk strikes the wheel and cramps it under the wagon, the questions of the due care of the woman and the negligence of the railway company are for the jury.

THREE ACTIONS OF TORT, two for personal injuries from a collision of a car of the defendant with a wagon in which the plaintiff Mary J. Kennedy was driving on Merrimack Street in Haverhill and in which her mother, the other plaintiff, was seated beside her. The third action was by the husband of Mary J. Kennedy for expenses and loss of services. Writs dated December 30, 1899.

At the trial in the Superior Court before *Richardson*, J., it appeared, that the plaintiff Mary J. Kennedy had lived in Haverhill for many years, had driven more or less for twenty years, had frequently driven through Merrimack Street and knew of the existence of the double tracks of the defendant there. The accident occurred on November 8, 1899, between four and five o'clock in the afternoon, the day being bright and clear. The street, which ran east and west at the place of the accident, was thirty-two feet in width from curb to curb, and the distance from the southerly curb to the southerly rail of the defendant's track was nine feet. The evidence for the plaintiffs tended to prove that on the day of the accident the plaintiffs Mary J. Kennedy and Ann McFee went in an open Concord wagon to that part of Haverhill called Mt. Washington, which was at a considerable distance west of the point of the accident; that after stopping for a time they drove along Washington Street, which runs east and west, and passed into Merrimack Street, which also runs east and west from the easterly end of Washington Street; that the street was "full of teams"; that the plaintiff Mary J. Kennedy drove across the tracks diagonally for the purpose of going to a grocery store on the south side of the street; that as she crossed the tracks she saw one of the defendant's cars a short distance to the west, which was stopped and was on the southerly track, and knew that when the car started it would move east and in the direction in which she was going; that she drove to the southerly side of the street and came to a stop, with her horse's head at the curb and behind a team which was standing there, and left her wagon standing at such an angle with the curb that its left hind wheel was so near the

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southerly rail of the defendant's tracks that the car could not pass without striking it; that while in this position the plaintiff, Mary J. Kennedy, with the intention of alighting, requested the other plaintiff, Ann McFee, to take the reins; that Mrs. McFee declined to take them, saying that she would wait until the car had gone by; that from the time that the plaintiff drove up to the south curb until the collision her horse stood perfectly still; that the car was moving slowly at a pace not faster than a walk, and was stopped within a few feet from the point of the collision, the effect of which was to cramp the wheel under the wagon, raising it up on one side so as to tip the occupants into the street.

Witnesses for the defendant testified, that as the car approached, the left hind wheel of the plaintiff's wagon was from twelve to fifteen inches distant from the extreme overhang of the defendant's car, and that the car had proceeded safely by the wheel almost its entire length when the plaintiff's horse backed the wagon so that the wheel struck the car at a point about three feet from the rear step on which it caught.

The defendant asked the judge to rule that upon all the evidence in the case the plaintiffs were not entitled to recover. The judge refused to give this ruling and submitted the case to the jury upon instructions not otherwise excepted to. The jury returned a verdict for the plaintiff in each case; and the defendant alleged exceptions.

J. P. Sweeney, for the defendant.

H. J. Cole, for the plaintiffs.

HAMMOND, J. Upon the evidence the jury were warranted in finding that the collision occurred in broad daylight, while the team driven by Mrs. Kennedy was momentarily at a stop in a crowded street, with the rear end of the carriage near the rail of the defendant's track. It is true that the defendant's explanation of the collision was very different, but it was for the jury to decide which view of the accident was correct.

The defendant contends that the evidence was insufficient to warrant a finding of due care of the plaintiff or negligence of the defendant. It does not seem useful to recite here the evidence in detail. The plaintiffs and defendant were travellers upon a public highway, each bound to respect the rights of the

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other as such. In view of the testimony introduced by the plaintiff as to the width of the street, the space occupied by the railway tracks, the congested condition of the travel at and just prior to the time of the accident, the momentary nature of the stop and the reason for stopping there, we think that the questions of due care and negligence were for the jury.

Exceptions overruled.

WALTER H. HOWE, executor & trustee, *vs.* BERTHA L. HOWE & others.

Middlesex. March 11, 1903. — June 19, 1903.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Devise and Legacy, Construction. *Executor.*

A testator left all his property remaining after the death of his wife to his three children "to be divided among them equally, except that, whatever shall at my death be due me from K. individually or from the firm of K. and Company . . . shall be deducted from the share of my said daughter N. and reckoned as part of her one third in the clause given to her." K. was the husband of the daughter named. Both K. and the testator had been members of the firm named, but it was dissolved by an agreement of liquidation made nearly two years after the will was executed and only six days before the death of the testator. By this agreement the testator and a third partner assumed the firm debts and conveyed to K. certain firm property on his agreeing to give his personal services without compensation to liquidating the business and to pay the testator and the other partner a certain amount, for which he gave notes to each of them. *Held*, that the only deduction to be made from the share of the daughter was the amount of notes of K. held by the testator at the time of his death, all debts to the testator from the firm having been extinguished by the dissolution and the liquidation agreement. *Held, also*, that, on the notes of K. to be deducted, interest was to be reckoned only to the time of the testator's death, *and, also*, that the notes of K. should be transferred to the testator's daughter N. or the administrator of her estate, and that the amount of the notes with interest to the death of the testator was to be reckoned in ascertaining the whole fund to be divided.

BILL IN EQUITY, filed July 31, 1902, by the surviving executor and trustee under the will of Henry C. Howe, late of Lowell, as to his duties in carrying out the provisions of the third clause of that will.

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The case came on to be heard on October 22, 1902, before *Knowlton*, J., who reserved it upon the bill and answers for determination by the full court, such decree to be entered as law and justice required.

The third clause of the testator's will was as follows:

"At the decease of my wife I give, devise and bequeath all that shall then remain unexpended of my estate real and personal, to my three children, to be divided among them equally, except that, whatever shall at my death be due me from Charles B. Kelley individually or from the firm of C. B. Kelley and Company of Chicago, Illinois, including in such indebtedness any and all liability incurred on account of any endorsement or endorsements of promissory notes either of or for said Charles B. or of or for said firm, shall be deducted from the share of my said daughter Nellie F. Kelley and reckoned as part of her one third in the clause given to her."

The testator left a wife and three children one of whom was Nellie F. Kelley, the wife of Charles B. Kelley.

E. Fisher, for the trustee.

F. A. Fisher, for Walter H. Howe in his individual capacity, and Bertha L. Howe.

F. N. Wier, for Hudson Kelley, a minor under guardianship, and Charles B. Kelley, administrator of the estate of Nellie F. Kelley.

BARKER, J. All parties agree that the notes for $37,500 with interest to the date of the testator's death are to be deducted from the share of his daughter Nellie and reckoned as part of her one third. All of these are obligations to the testator owing from Charles B. Kelley individually and so within the plain meaning of the clause giving the testator's property equally to his three children at the decease of his wife, with certain deductions from the share of his daughter Nellie, to be reckoned as part of her one third.

1. The two other children contend that there should be other deductions because of the testator's relation to the firm of C. B. Kelley and Company as partner and creditor, and under the direction so to deduct and reckon whatever at the testator's death should be due him from the firm including the testator's liability on account of indorsements for it.

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The firm was formed on June 28, 1892, and continued until February 11, 1898, when it was dissolved by a written agreement of the individual partners providing how its affairs should be liquidated. The will was executed on April 24, 1896, and the testator died on February 17, 1898.

When the firm was formed the testator paid in the sum of $10,000 as capital which with interest was to be deemed a debt due to him from the firm. At the end of the first year's business $4,078.18 was credited to him as his share of profits. After the first year the business was conducted at a loss. At the date of the will the total indebtedness of the firm to its partners and others was $162,342.47, and the testator was an indorser on $28,000 of firm notes and had a credit on its books of $14,305.84. On December 31, 1897, the total indebtedness of the firm was $240,298.21, and the testator had a credit on its books of $41,255.84, made up of his original contribution to capital, his first year's profits, and of sums which he had paid out in taking up or caring for promissory notes of the firm on which he was indorser.

By the liquidation agreement which dissolved the firm on February 11, 1898, the testator and another partner assumed the firm debts, and conveyed to Charles B. Kelley the third partner, certain lands, mills, machinery, fixtures, appliances, and tools, and Charles B. Kelley sold to the two partners all other property of the firm and agreed to give his personal services without compensation to liquidate the firm business and further agreed to pay the two partners the sum of $42,000 in eighty-four notes of $500 each upon time one half of which notes were made to the testator. The business of the firm has been liquidated in accordance with this agreement.

The petition does not state the value of the property which by the terms of the agreement of February 11, 1898, passed to Charles B. Kelley nor of that which passed to the two other partners of whom the testator was one, nor the amount of money which the testator and his executors have paid out in performance of the obligation to assume and pay with the other partner the debts of the firm. But we assume that the testator suffered a heavy loss through his connection with the firm, and that up to the time of its dissolution, there was due to him from the firm,

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including as such indebtedness the amount of notes on which he was liable as an indorser, a much larger sum than the amount of the notes received from Charles B. Kelley under the liquidation agreement.

We are of opinion that no deduction is to be made from the share of the daughter Nellie on account of the testator's relations with the firm of C. B. Kelley and Company, except of the notes of Charles B. Kelley held by the testator at his death and which whether arising from firm affairs or otherwise are said in the petition to amount to the sum of $37,500. The daughter Nellie was not a member of the firm, nor a debtor of the testator. If he saw fit to prosecute business as a member of a firm, that was not a reason why he should charge to his daughter whatever he might lose in connection with the business. The fact that his daughter's husband was also a member of the firm might naturally lead the testator to reckon as part of her share what the firm might be owing him at his death. Such indebtedness would be property, valuable or not as the case might be, and property which if owned by him at his death must be dealt with in the settlement of his estate. But if the firm should be dissolved in his lifetime, although he might have rights and property growing out of his connection with it, it could not in the ordinary meaning of words be said that at his death anything was due him from the firm. The effect of the dissolution and of the liquidation agreement was to extinguish the previously existing indebtedness of the firm to him, and to give him in place of it his half of the assets other than those conveyed to Charles B. Kelley, and his half of the latter's notes, and after that agreement was executed no payment of his of a firm debt created in him a debt from the firm, because of his agreement to assume and pay that debt for the consideration and upon the terms stated in the agreement. The agreement having been made, carried out so far as it could be up to the time of his death, the testator then had no property which could be described as something due him from the firm. He had a half interest in some property which had constituted a part of the firm's assets, an interest in Charles B. Kelley's agreement to give his services in the liquidation without pay, and an interest in the other partner's agreement to assume equally with himself

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the debts of the firm, and his half of the $42,000 in notes, and having these several properties nothing was then due him from the then former firm of C. B. Kelley and Company.

2. As the deduction is to be of whatever was due the testator at his death, and as the child from whose equal share it is to be taken was not a debtor of the testator's, interest on the $37,500 of notes to be deducted is to be reckoned only to the time of the testator's death. See *Taylor* v. *Taylor*, 145 Mass. 289.

3. As the amount of the fund for distribution is so large that there is no probability that the amount to be deducted and reckoned in the share of the daughter Nellie can equal one third of the fund we express no opinion upon the questions which contemplate the possibility of an excess of the amount to be deducted over one third of the fund.

4. Upon distribution of the fund the administrator of the estate of the daughter Nellie will be entitled to receive as such administrator the notes of Charles B. Kelley deducted from and reckoned in her one third. The petitioner should indorse them without recourse.

5. The $37,500 of the notes, with interest to the death of the testator is to be reckoned in ascertaining the whole fund to be divided.

6. We are asked to instruct the petitioner whether the title to the real estate of which the testator died seised is vested in the plaintiff as surviving executor or trustee and whether he has the power under the will to sell and convey said real estate for the purpose of converting it into money to make a division in accordance with the third clause of the will.

Upon this question no argument has been addressed to us upon one of the two briefs submitted, and the only argument upon it in the other brief is merely a statement that a sale of the real estate will be necessary in order to make the division and that the question of the present power of the petitioner as surviving trustee to make such sale depends primarily on the fact whether or not the trust terminated at the decease of Mrs. Howe. It is clear that it is the duty of the petitioner to proceed to make a final division of the trust property. It is not certain that by agreements between the parties entitled to share in the division a sale of land may not be made unnecessary. If

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such a sale becomes necessary it can be made under the provisions of R. L. c. 147, § 15, or of those of R. L. c. 147, § 20. If in future it shall appear to the petitioner that he cannot reasonably make the division without making a sale under the power given in the second clause of the will the parties may submit new briefs upon that question.

Decree to be entered in accordance with opinion.

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CHARLES M. MORRISON *vs.* WHITTIER MACHINE COMPANY.

Suffolk. March 13, 1903. — June 19, 1903.

Present: KNOWLTON, C. J., LATHROP, BARKER, & HAMMOND, JJ.

Negligence, Employer's liability.

In an action by a workman in a foundry against his employer for injuries from the breaking of a rope which a fellow workman had used to attach an iron plate to a travelling crane, it appeared, that each workman when attaching articles to the crane used the chain, strap or rope which he chose for the purpose, that no special place was provided for keeping these appliances and that they commonly were left on the floor which was likely to be wet and more or less full of sand, but it did not appear that the rope in question or any appliances had been injured in this way. There was a superintendent in charge. *Held*, that if the rope was chosen negligently this was the act of a fellow servant for which the defendant was not liable, and that the fact that the superintendent did not prevent workmen from leaving chains, straps and ropes on the floor when not in use or from using ropes for purposes for which they were not suitable, was not evidence of negligence on his part.

TORT, by a helper in the defendant's foundry, for injuries from an iron plate falling upon him in consequence of the breaking of a rope by which it was attached to an electric crane. Writ dated September 22, 1894.

In the Superior Court the case was tried before *Blodgett*, J. The defendant offered no evidence, and the judge ruled that upon all the evidence the plaintiff could not recover, and ordered a verdict for the defendant. The plaintiff alleged exceptions, which after the resignation and death of *Blodgett*, J. were allowed by *Sheldon*, J.

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W. A. Buie, (*H. F. Naphen* with him,) for the plaintiff.

H. E. Warner, for the defendant.

BARKER, J. The plaintiff was hurt in consequence of the breaking of a rope which a fellow workman had taken and used to attach an iron plate to a travelling crane in the defendant's foundry. The evidence tended to show that there were in the foundry divers chains, straps and belts of leather, and ropes of different materials provided for the use of the workmen in attaching to the crane different articles to be by it lifted or moved, and that each workman chose the chain, strap or rope which he used for the task in hand. The rope which broke was of cotton and had been procured to use in lifting a core of comparatively soft material which might be injured by the use of a chain, and upon which a hemp rope of larger diameter could not be used because it could not be withdrawn from under or around the core when the core had been put in place. The evidence did not tend to show that the cotton rope was in any way unsuitable for the use for which it was put in the foundry, where it had been for six or seven weeks before the accident. Leather straps also were suitable for the lifting of cores and the evidence showed that such straps were provided for that purpose. It also showed that chains of different sizes were provided for use in lifting and carrying by means of the crane other heavy articles than cores, and the whole evidence would not justify a finding that there was any negligence on the part of the defendant in providing or in keeping on hand a sufficient and suitable supply of ropes, belts and chains from which the workmen could at will select proper ones for the different articles to be lifted or moved. The rope which broke was applied of his own choice by the fellow workman in charge of the iron plate to the use of attaching the plate to the crane, and probably negligently so applied as the chains were more suitable for that purpose. But if this use of the rope was negligent the negligence was that of a fellow servant.

The evidence tended to show that no special place in the foundry was provided for keeping chains, belts or ropes when not in use, and that such utensils were commonly left on the floor of the foundry by the workmen when through using them, and that the floor was likely to be wet and to be more or

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less full of sand, and the plaintiff contends that this state of things was evidence to be submitted to the jury upon the question whether the defendant used due diligence to furnish and keep on hand safe and suitable appliances. There was no evidence that the rope which broke or any of the utensils provided for such uses had been damaged by reason of the want of a special place for keeping them when not in use, or by allowing them to be on the floor of the foundry when not in use. We think there was nothing in this aspect of the case which required its submission to the jury.

Nor do we think that the fact that there was a superintendent in charge and that he did not prevent the workmen from leaving chains, belts, straps or ropes on the floor when not in use, and did not prevent the workmen from using this or other ropes for purposes for which they were not procured or suitable was evidence of negligence on his part which required the submission of the case to the jury. So close an oversight and control of workmen by a superintendent is not necessary and would not be practicable, and is not required by due care.

Exceptions overruled.

GEORGE H. GOODHUE *vs.* HARTFORD FIRE INSURANCE COMPANY.

Suffolk. March 17, 1903. — June 19, 1903.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Insurance, Fire.

A rider attached to a policy insuring goods against fire provided that the goods might be removed to a designated storehouse in a certain town reached by railroad, and stipulated that during removal the policy was to "attach in each location in proportion as the value in each bears to the value in all, and after removal in new location only." A fire occurred during removal by which some of the goods were destroyed while in railroad cars at the town of their destination but before being unloaded or taken to the designated storehouse. *Held*, that the goods on the cars were not covered by the insurance.

A temporary contract of insurance called a "binder", to continue by its terms only until a policy delivered to the insurer for modification has been returned to the assured, cannot affect the rights of the parties as to a loss by fire occurring after the policy has been returned.

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CONTRACT on a policy insuring certain wool, wool bags and bagging of the plaintiff against fire. Writ dated September 10, 1898.

In the Superior Court *Sheldon*, J. ordered a verdict for the defendant; and the plaintiff alleged exceptions.

The rider of April 30, 1898, mentioned by the court began as follows:

"Boston, Apr. 30, 1898.

"Permission is hereby given to remove the within insured property to Brick & Stone Building adjoining and communicating occupied by Dennis & Lovejoy for storage situate opposite the Railroad Station, Ballardvale, Mass., and during removal this Policy shall attach in each location in proportion as the value in each bears to the value in all, and after removal in new location only, and not as heretofore.

"New Rate 50¢. Return premium $2.72."

There was another paragraph in regard to various matters not material.

The "binder" containing the temporary contract mentioned by the court began as follows:

"Boston, April 30th, 1898.

"The undersigned Insure for account of G. H. Goodhue & Co. in amount specified below, on Wool, Wool Bags and Bagging located at Ballardvale.

"As per form C.

"This certificate binding until policy is delivered to J. W. Porter & Co.

"Any loss occurring before Policy is written, to be settled concurrent with any other Insurance on same property at the time of loss."

W. R. Sears & A. Lincoln, for the plaintiff.

J. D. Bryant, (*L. S. Dabney* with him,) for the defendant.

BARKER, J. There was no evidence of any oral contract of insurance nor of any oral waiver of any term of the policy, nor of any oral permission to remove the goods insured. When issued the policy covered the goods in store No. 1, East Boston. On December 3, by the rider of that date it ceased to cover goods there and covered those in store No. 2. It never covered the goods in Ballardvale except under the terms of the rider of

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April 30, which allowed removal to a designated storehouse in Ballardvale, but stipulated that during removal the policy was to "attach in each location in proportion as the value in each bears to the value in all, and after removal in new location only." There can be no contention that either party intended that the defendant should insure the goods *in transitu*. The rider by the words "each location," meant the store No. 2, and the designated storehouse in Ballardvale, and under its operation the policy covered none of the goods except such as should be in one or the other of those storehouses. Such of them as were on railroad cars were still in the process of the removal which was permitted but during which they were not insured. It follows that at the time of the fire the policy covered no wool in Ballardvale except that in the designated storehouse.

Because when the removal to Ballardvale was first decided upon it was not known in what storehouse the wool would there be stored, a separate contract of insurance was made by the instrument called the "binder," of April 30. This was in form and terms a contract of insurance by which the companies insured the wool "located" at Ballardvale. Assuming that this meant wherever in that place the wool might be, yet by the terms of the written instrument this insurance was to continue only until the policy, which had been given to the insurers for modification, should be delivered to J. W. Porter and Company, that is to say returned to the plaintiff's brokers. That delivery took place before the loss by fire, so that there was no insurance under the "binder" when the fire occurred. As at the time of the loss that part of the wool which was on the cars was not covered by insurance the verdict was ordered rightly.

Exceptions overruled.

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MATILDA F. CARY, administratrix, *vs.* JULIUS LESZYNSKY.

Suffolk. March 18, 1903. — June 19, 1903.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Contract, Performance and breach, Rescission.

One who has paid a sum of money under a contract in writing by which another agreed upon such payment to transfer to him a certain number of "pooling shares" in a certain company, upon showing a failure to transfer the shares after the expiration of the pooling agreement may recover back the money that he paid, and it is no defence to such an action that when the promise was made the plaintiff was connected with the pool as a member and trustee and was an officer of the company and there had been an overissue of stock.

CONTRACT, by the administratrix of the estate of William H. Cary, for $841.50 paid by the plaintiff's intestate under a contract in writing by which the defendant agreed upon such payment to transfer certain shares of mining stock to the plaintiff's intestate, alleging a failure of the defendant to deliver the shares as a total failure of the consideration for which the money was paid. Writ in the Municipal Court of the City of Boston dated December 18, 1901.

On appeal to the Superior Court the case was tried before *Mason*, C. J., without a jury.

The contract was as follows: "Dec. 17, 1898. In consideration of $841.50 each received from Messrs. Cary & Hare, making $1,683 in all, I hereby agree to transfer to each of them eight thousand five hundred shares of pooling shares in the Montana & Arizona Consolidated Copper Mining Company, making 17,000 in the holdings in the above company which I have acquired from J. W. Winwood. Julius Leszynsky."

The plaintiff's intestate was the Cary referred to in the foregoing contract. The defendant testified among other matters that at the time of the execution of the agreement Cary was vice-president and a director of the company, and was one of the trustees and one of the parties to the pooling agreement referred to in the contract. There was evidence that there had been an overissue of the stock of the company. Cary died December 9, 1899.

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The plaintiff contended that the defendant had never transferred the shares of stock to Cary and that she was entitled to recover back the $841.50 paid for such transfer.

The defendant asked the judge to rule, as a matter of law, that upon all the evidence the plaintiff was not entitled to maintain her action and that the defendant was entitled to a verdict. The judge refused so to rule, and found for the plaintiff in the sum of $891.15. The defendant alleged exceptions.

J. R. Murphy, for the defendant.

B. N. Johnson, R. P. Clapp & W. O. Underwood, for the plaintiff.

BARKER, J. The bill of exceptions brings here a question as to the admissibility of evidence, and also the contention that upon all the evidence the plaintiff was not entitled to maintain the action.

1. The exception to the admission of evidence has not been alluded to in the defendant's brief, and has no merit. It was to allowing a clerk in charge of the transfer department of the trust company which had charge of the transfer books of the mining company concerning the stock of which the action was brought to testify to matters within his personal knowledge and relevant to the issue upon trial.

2. Assuming that the written agreement of December 17, 1898, because of the characterization in it of the stock which by it the defendant agreed to transfer as "pooling shares" impliedly contemplated a transfer only after the termination of the pooling agreement, the evidence justified a finding that the pool terminated by its own limitation on July 1, 1899, more than six months before the death of the plaintiff's intestate.

The evidence upon the question of the acts of the defendant looking toward a transfer of the shares in accordance with his agreement was conflicting. He testified to writing an order for the transfer and that the plaintiff's intestate delivered this order to the secretary and that the shares thereupon were transferred. But there was other testimony that the defendant did not give such an order, that no such order was presented to the secretary, that no part of the shares was issued to the plaintiff's intestate, and that the defendant protested against their issue. The acknowledgment in the written agreement of

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the receipt by the defendant of the price of $841.50, and the testimony both of the defendant and of another witness justified a finding that the whole sum sought to be recovered was the consideration which had in effect been paid to the defendant upon the making of the agreement, and as moving from the plaintiff's intestate. The evidence justified a finding that the defendant neglected to perform his agreement to transfer the shares. Neither the fact that the plaintiff's intestate was connected with the pool as member and trustee, or that he was an officer of the company, or that there had been an overissue of its stock, constitutes a defence to the present action.

Exceptions overruled.

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ETHEL S. SAMPSON *vs.* CITY OF BOSTON.
SAME *vs.* CHARLES R. GOW & another.
ROBERT M. SAMPSON *vs.* SAME.

Norfolk. March 18, 1903. — June 19, 1903.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Negligence, Contributory. *Way*, Defect in highway.

Where paving stones have been piled along the edge of the sidewalk of a street of a city by a sewer contractor, and the street is open for travel, a woman who trips and falls over some of the stones when about to step from the sidewalk to an open electric car, looking for a seat in the car with her attention not wholly upon her footing, in actions against the city and the contractor for injuries thus caused may be found to have been in the exercise of due care, if there is evidence that the stones were hidden from her view by persons behind whom she was walking and that she did not see the stones until she fell over them.

THREE ACTIONS OF TORT, the first action by Ethel S. Sampson against the city of Boston for injuries from an alleged defect in Washington Street, a highway in that part of Boston called Forest Hills, consisting of a pile of paving stones on the sidewalk of that street, the second action by the same plaintiff against Gow and Foss, contractors, for negligently piling and leaving the stones on the sidewalk, and the third action by

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Robert M. Sampson, husband of Ethel, against the same contractors for damages by reason of her injuries. Writs dated in August, 1900.

In the Superior Court the cases were tried before *Sherman*, J. It appeared that at the time of the accident the defendants Gow and Foss had a contract with the city of Boston under which they were laying house connections from the sewer in the centre of Washington Street to the building line on the easterly side of the street. The gutters of Washington Street and the spaces between the railway tracks were paved with square paving stones. The employees of the defendants Gow and Foss, in order to excavate a ditch for one of these connections, had removed twenty-five or thirty of the paving stones from the space where they were to dig and piled them along the edge of the easterly sidewalk between a trolley post and a telegraph pole and to some extent beyond each. The accident happened from the plaintiff tripping and falling over some of these paving stones when about to step from the easterly sidewalk to an open electric car. The plaintiff Ethel and a companion were on the way from Boston to Hyde Park. They had come in an electric car from Boston to Forest Hills and were on the sidewalk of Washington Street waiting to take a car of the Norfolk Suburban Railway from Forest Hills to Hyde Park. As the car approached they were walking in the direction of Hyde Park to meet it. When the car passed them going in the direction of Boston they turned and walked back to overtake the car when it stopped. The plaintiff and her companion walked toward the rear of the car behind other people. The plaintiff testified "We were almost the last ones to get on, and I was behind a lot of people and I didn't see the stones." She further testified that she was looking for a vacant seat, and that when she fell she was about to take hold of the stanchions of the car "to get up on the step."

At the close of the evidence the defendant city requested the judge to rule that upon all the evidence it could not be held liable, and that there must be a verdict for that defendant in the action against it. The judge refused so to rule. The defendants Gow and Foss requested the judge to rule that upon all the evidence the plaintiff Ethel was not in the exercise of due care

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and could not recover. This request was refused. The cases were submitted to the jury under instructions to which no exceptions were taken by either of the defendants other than their exceptions to the above refusals to rule as requested.

The jury found for the plaintiff in each case; and the defendants alleged exceptions.

A. L. Spring, for the city of Boston.

T. E. Grover & J. P. Lyons, (*C. S. Knowles* with them,) for Gow and Foss.

H. E. Bolles, (*W. L. Cherrington* with him,) for the plaintiffs.

BARKER, J. The single question for decision is whether upon all the evidence the jury would be justified in finding that the plaintiff who was hurt was in the exercise of due care. As bearing upon this question the defendants contend that the street was closed to travel and that the plaintiff who was hurt knew that the street was so closed, and they cite *Jones* v. *Collins*, 177 Mass. 444, and *Compton* v. *Revere*, 179 Mass. 413. But in the present case the evidence did not require a finding that the street was in fact closed to travel. On the contrary it well might be found that the street was in use for travel and had not been closed, but merely that some barricades and warnings had been erected to point out dangers to travellers who were expected to use the way.

The condition of the street not being such as to necessitate the conclusion that it had been closed to travel, the care or negligence of the plaintiff who was hurt must be determined by applying the test which is usual. She was on foot and her purpose at the time she was hurt was to board an open electric car. In attempting to do so she stumbled and fell over a pile of square stone paving blocks. In walking toward the car her attention was not upon her footing wholly but was engaged upon the obtaining of a seat in the car, so that she did not look wholly to the ground, but to the car to see where there were seats. There was no evidence of her negligence except that she trusted herself to walk upon a road where changes were going on, and that she fell over a pile of stones which were in her way, and that she allowed herself while walking to look at the car. On the other hand there was evidence that the stones were hidden from her view by the people who were in the vicinity

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and behind whom she was walking, and that she did not see them before she fell over them. The question of her care was for the jury.

Exceptions overruled.

NINETEENTH WARD BANK *vs.* FIRST NATIONAL BANK OF SOUTH WEYMOUTH.

Suffolk. April 2, 1903. — June 19, 1903.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Bills and Notes. Agency.

Where a bank receives from another city for "collection and remittance" a note of one of its depositors payable at that bank and properly indorsed, having authority to pay notes of the maker out of his deposit when made payable there, and at the maturity of the note, after writing a check on a bank in the other city for remittance of the amount, stamps on the face of the note the word "Paid" with the date, cancels the note by perforation, and files it with the paid checks, this constitutes payment of the note as against an assignee for the benefit of creditors of the maker who gives notice to the bank by telephone of the assignment before the transaction has been entered on the permanent books of the bank and before the letter of remittance has been mailed.

CONTRACT, with counts for money had and received and upon an *insimul computassent*, to recover the amount of a note of A. O. Crawford and Company sent by the plaintiff to the defendant for collection. Writ dated October 12, 1901.

The answer contained a general denial and also set up a special defence, alleging that A. O. Crawford and Company on the day of the maturity of the note made an assignment for the benefit of creditors including the deposit in the defendant bank, of which it was alleged that the defendant had notice before payment of the note was demanded.

In the Superior Court the case was tried before *Stevens*, J., without a jury. The third instruction requested by the plaintiff, which is mentioned by the court, is as follows: "By taking the note off the files on the proper day for payment, cancelling it and making the proper and usual memorandum and entries through its cashier, the defendant bank did all

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that was necessary to make a proper and valid presentation, payment and cancellation of said note, which cannot be afterwards revoked by the defendant."

The judge refused to give this and other instructions requested by the plaintiff. He found that the note had not been paid before notice of the assignment, and found for the defendant. The plaintiff filed exceptions which were disallowed because notice of filing was not given in time, and at the plaintiff's request the judge reported the case for determination by this court. If the plaintiff's requests for rulings should have been given, a new trial was to be ordered; otherwise, judgment was to be entered on the finding.

W. A. Gaston, F. E. Snow & R. M. Saltonstall, for the plaintiff.

G. L. Wentworth, for the defendant.

HAMMOND, J. The sole question is whether the note was paid before the defendant was notified of the failure and assignment of the makers. The judge found that it had not been paid. This finding must stand unless there was some error of law made at the trial.

The facts do not seem to be in dispute, and, stated in its lowest terms, the real question is whether they show as matter of law a payment of the note.

The note properly indorsed was sent several days before its maturity to the defendant for "collection and remittance." The makers were regular depositors at the defendant bank, and the note was upon its face made expressly payable there. On Monday, October 7, 1901, the time for the payment of the note had come. It was in the hands of the defendant as the indorsee and holder for collection, and the deposit of the makers then in the defendant's hands was more than sufficient to pay it.

It is well to see what were the duties and powers of the defendant at this time with reference to the note. The defendant as the indorsee and representative of the real owner of the note was the party entitled to demand and receive payment. Payment to it by the makers would be therefore a payment of the note. It had a further duty, which was to remit to the plaintiff the money received from the makers. It is obvious that this last act was no part of the payment of the note. It was an act

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with which the makers had no concern, because if the note was paid by them to the defendant their liability was entirely discharged.

What was the relation of the defendant to the makers, and what could it do as their agent? It had in its vault money belonging to the makers and sufficient to pay the note which was expressly made payable at the bank. In England it is well settled that if an acceptor makes his acceptance payable at a particular bank it is tantamount to an order on his part to the bank to pay the bill to any person who by the law merchant is entitled to give a good discharge. See *Robarts* v. *Tucker*, 16 Q. B. 560, 578; Dan. Neg. Instr. (5th ed.) § 326 *a*, and cases therein cited. And although in this country there is some conflict, still it would seem that by the weight of authority a note payable at a bank where the maker keeps his account is equivalent to a check drawn by him upon that bank, so far at least as respects the power and duty of the bank to pay it. *Indig* v. *National City Bank*, 80 N. Y. 100, 106, *Wyman* v. *Fort Dearborn National Bank*, 181 Ill. 279, and other cases cited in Dan. Neg. Instr. (5th ed.) § 326 *a*. But whatever may be the rule in the absence of any directions to the bank from the maker, it appears from the evidence in this case that the defendant, in accordance with the understanding between it and these makers, had been in the habit of paying their notes when made payable at the bank, and in accordance with this course of dealing it must be assumed that the bank was directed by the makers to pay this note at maturity out of the deposit then standing therein to their credit. Indeed the defendant does not contend to the contrary. Since the cashier represented the bank, his act and purposes were those of the bank.

In this state of things the cashier, charged with the duties and invested with the powers of the defendant both as to the plaintiff and as to the makers respecting this note, proceeds on October 7, 1901, soon after the beginning of the day's business, to the performance of his task. He intends as agent of the makers to pay this note to his own bank, the indorsee and holder, and as such entitled to receive payment and discharge the note. He intends as cashier of his own bank to cancel and discharge the note when paid, and then as agent for the makers

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to hold the paid note for them. After the note has been paid he intends to send the proceeds to the plaintiff. With these intentions he begins. The note is before him. He first draws on a bank in Boston his check as cashier of the defendant, payable to the order of the plaintiff for the amount of the proceeds of the note. It is to be observed that this is not the check of the makers nor is it made by the cashier as their agent, but in his capacity as agent of the defendant, and in the performance not of a duty owed by the makers but of a duty owed by the defendant to the plaintiff. It is not the check by which the note was paid because none was needed, but was the check by which the proceeds were to be transmitted by the defendant to the plaintiff. He then makes a memorandum of this check upon a block, stamps upon the face of the note "Paid Oct. 1901, First National Bank, So. Weymouth, Mass.," and perforates the note in three places. He then puts the note thus stamped and mutilated in the file with his checks, so that the proper record of the transaction may be entered at the end of the day upon the permanent books. So far he has gone when he is called to the telephone and notified that the makers have made an assignment for the benefit of their creditors, and he is requested by the assignee to hold the account. He replies that there is one (meaning this) note which he had paid or "made a check for it." Soon afterwards, at the request of the assignee, he withheld the check he had drawn and undertook to retrace his steps.

We are of opinion that prior to the call to the telephone the note had been paid by the makers to the defendant, and that the only remaining duty resting upon the defendant was to remit the proceeds to the plaintiff. As against the makers the defendant was the indorsee and holder of the note. As the agent of the makers it had been requested by them to pay it. No check was expected from the makers. The note itself was equivalent to a check. It stood exactly as though the makers owing the bank had delivered to it a check in payment. When the bank, through its cashier, wrote upon the face of the note in its own name as the indorsee and holder that it was paid, and perforated it and put it in the files as a thing paid, nothing more was to be done as to the payment. By those acts there had been set apart and appropriated to the payment of the note so much of the deposit

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then standing to the credit of the makers as was sufficient for that purpose, just as though the makers had presented to the bank their check in payment of a claim due it from them. It is true that the proper records were to be made upon the books, but the payment is effected by the acts and not by the record, and was valid even without records. Consequently the question of the subsequent records is not material. So far as respected the plaintiff, the defendant had received the money for the note and was bound to remit it to the plaintiff.

We think that under the circumstances disclosed in this case the third instruction requested should have been given. In accordance with the terms of the report there is to be a

New trial.

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FRANCES F. LUTOLF, administratrix, *vs.* UNITED ELECTRIC LIGHT COMPANY.

Hampden. April 8, 1903. — June 19, 1903.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Electric Light Company. Negligence. Pleading, Civil. Practice, Civil.

In an action against a corporation operating an electric light plant for causing the death of the plaintiff's intestate, it is evidence of negligence on the part of the corporation itself, that under its system of inspection it was the duty of no one to make a thorough examination oftener than once in nine days of each lamp fed by a wire carrying a dangerous electric current, and that the examinations once in nine days were made only in connection with the manual work of cleaning globes and renewing carbons, although twice each night inspectors drove past to see that the lamps were in working order.

In an action against a corporation operating an electric light plant for causing the death of the plaintiff's intestate, an allegation in the declaration that the defendant negligently suffered its wires to be out of repair, is sufficient to raise the issue of a proper method of inspection.

In an action against a corporation operating an electric light plant for causing the death of the plaintiff's intestate, there was evidence, that nearly an hour before the plaintiff's intestate was killed by an electric shock received near a pole of the defendant, a servant of the defendant at its power house had received messages by telephone that the pole was on fire and that a wire was down there, and instead of causing the current to be shut off, which would have prevented the fatality, ordered an inspector to go to the place, and that the inspector might have arrived in from five to eight minutes, but that more than half an hour

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elapsed before the accident and the inspector did not arrive until after it had occurred. *Held*, that the jury properly could find gross negligence on the part of the servant at the power house in not ordering the current to be turned off and also gross negligence on the part of the inspector in not arriving at the place of the accident within a reasonable time.

If the judge who tried a case dies while a motion for a new trial is pending and the party making the motion proceeds with it before another judge, he cannot after a denial of his motion take the ground that the judge had no power to deny it.

TORT, under St. 1897, c. 416, and St. 1898, c. 565, (R. L. c. 171, § 2,) by the administratrix of the estate of Frederick W. Lutolf, late of Springfield, for the death of her intestate alleged to have been caused by the negligence of the defendant and the gross negligence of the defendant's servants and agents. Writ dated September 10, 1901.

At the trial in the Superior Court before *Hopkins*, J., it appeared that the death of the plaintiff's intestate occurred on the evening of June 12, 1901, from an electric shock received near an electric light pole of the defendant on the south side of High Street in Springfield under the circumstances stated by the court, while the plaintiff's intestate was passing from his house on the south side of High Street in order to go to a hen-coop which he maintained on the north side of the same street beyond the pole. He was a coachman and had no knowledge of electricity.

The defendant's seven requests for rulings referred to by the court were as follows:

"1. Upon all the evidence in the case the plaintiff is not entitled to recover.

"2. There is no evidence that the defendant was negligent.

"3. There is no evidence of gross negligence or carelessness of any servant of the defendant.

"4. There is no sufficient evidence that the plaintiff's intestate was exercising due diligence at the time of his death.

"5. There is no evidence that it was any part of the duty of the plaintiff's intestate or that he was under any obligation to examine into the condition of the pole, but on the contrary he voluntarily exposed himself to danger of which he had been amply warned and which he had full opportunity to avoid, and the plaintiff cannot recover.

"6. Upon all the evidence in the case, the plaintiff's intestate

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having been warned to keep away from the pole and having persisted in approaching and examining it such act on his part was negligent whether he knew the precise nature of the danger or not, and contributed to the injury, and the plaintiff cannot recover.

"7. Under the pleadings no liability can be attributed to the defendant by reason of any alleged defective or improper method of inspection."

The judge refused to make the rulings requested.

The jury returned a verdict for the plaintiff in the sum of $2,500. The defendant filed a motion for a new trial on the grounds that the verdict was against the evidence and the weight of evidence, and that the damages awarded were excessive. *Hopkins*, J. died while this motion was pending, and later the motion was heard and denied by *Fox*, J. The last named judge allowed the defendant's exceptions in the form stated by the court.

W. S. Robinson, for the defendant.

J. B. Carroll & W. H. McClintock, for the plaintiff.

BARKER, J. The action is a statutory one for causing the death of the plaintiff's husband. The briefs of both parties assume that he was killed while upon the sidewalk of a public street and by means of an electric shock received when he was near an electric light pole which supported a lighted street lamp, and at a time when the current which fed the lamp was causing abnormal manifestations upon the pole and the apparatus attached to it.

The exceptions taken at the jury trial are to the refusal to give seven requests and to "the instructions given not in harmony with said requests." The bill sets out over sixteen pages of the charge, and has no statement of any specific objection to any instruction contained in it. The first request was that upon all the evidence the plaintiff was not entitled to recover. The second, third and seventh were addressed to the question of the defendant's negligence or that of the gross negligence of its servants. The fourth, fifth and sixth related to the question of the due care or negligence of the person killed.

After the verdict the defendant filed a motion for a new trial because the verdict was against the evidence and the weight of

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the evidence, and because the damages were excessive. After the filing of the motion the judge who presided at the trial died, and the motion having been heard and overruled by another judge the defendant excepted to the disallowance of the motion by that judge.

No argument outside of those addressed to the exceptions to the refusal to give the other requests has been made in support of the exception to the refusal to give the first request, and we overrule that exception for the reasons to be stated in connection with our decision as to the exceptions to the other requests. Upon the question of negligence upon the part of the defendant corporation itself, as distinguished from that of its servants or employees, the evidence tended to show that the pole and its appliances had been installed for three years or more and were part of one circuit of street lamps in a system of such circuits by means of which the defendant lighted the streets of Springfield. That these street lamps were fed by electricity distributed sometimes from the defendant's power house in the city and sometimes from a mill at Indian Orchard. That when the lamps were giving light the parts of the system in the streets carried a dangerous electric current. That defects in insulation of wires or defects in the poles or other parts of the apparatus in the streets might make the defendant's structures in the streets dangerous to persons who might be there. That the defendant employed men who twice every night drove past each street lamp and while so passing looked to see whether the lamp was burning properly, and if so passed on without stopping, and that one of these men had so driven past the place of the accident on the previous night and had then observed nothing unusual or out of the regular order. That the defendant also employed another set of men called trimmers who went to each lamp once in nine days, lowered the lamp, cleaned the globes and renewed the carbons and replaced the lamps, and that it was the duty of these men at the same time to look things over and see that there was nothing out of the way with the lamp or its apparatus or connections; and that the trimmer of the circuit in which was this lamp had visited it and trimmed it on the eighth day before the accident, and that he had then made the examination which it was his duty to make, and that then

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there was nothing out of the way so far as he could observe. That when the current was turned on to this circuit on the evening of the accident the lamp began to act abnormally, and that from that time until the current was turned off at the Indian Orchard power house at 9.15 P. M. the lamp continued to act abnormally, and that parts of the apparatus were burned and there were manifestations of the presence of electricity at the pole and at different parts of the connections between the pole and the lamp.

Whether the jury should have been instructed that there was no evidence of negligence on the part of the corporation itself turns upon the question whether the system of inspection was all that due care required of it under the circumstances. Under it no one had a duty of making a thorough examination, even by the eye, of the lamp and its connections oftener than once in nine days, and all such examinations were made in connection with the manual work of cleaning globes and renewing carbons. The visits twice each night of the inspectors who drove past showed simply that the lamp was in working order at that time and had no tendency toward ascertaining the presence of circumstances which might then be present and which at any moment might make the apparatus dangerous. Electric wires exposed in the open air to the action of the elements and all the apparatus of the pole and lamp as they grow older have an increasing tendency to become defective, while the destructive agency which they carry remains active.

Under such a condition of things the care which a corporation having a lighting plant extended throughout a city should exercise in the oversight of its apparatus with a view promptly to discover defects giving rise to the greatest danger is one which is peculiarly proper for the determination of a jury of the vicinage. In our opinion it was proper in this instance to submit it to the jury, and certainly in our view it would have been wrong to rule as matter of law that there was no evidence of negligence in this respect on the part of the defendant itself.

The seventh request was that under the pleadings no liability could be attributed to the defendant by reason of any alleged defective or improper method of inspection. We think the allegation that the defendant negligently and carelessly suffered

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and permitted its wires to be out of repair was enough to raise the question of a proper method of inspection.

Upon the circumstances bearing upon the question of gross negligence of the defendant's servants there was much conflicting testimony, especially as to the time when different things occurred.

On the part of the defendant there was testimony that the current was turned on to the circuit at 7.51 P. M. On the part of the plaintiff there was testimony that it was turned on before dark, which would have been still earlier. Evidence on the part of the defendant tended to show that the deceased received the shock very soon after 8 P. M., and on the part of the plaintiff that the shock was received after half past eight and but little before nine o'clock. Before the fatality word was sent to a fire engine station, telephone messages were sent to the defendant's city power station, a fireman visited the scene and tried to put out the fire on the post with an extinguisher. The deceased was not in the street until shortly before he was hurt and the time of his appearance and of the other circumstances mentioned and of other occurrences more or less material was given differently by different witnesses.

It would have been competent for the jury to find from the evidence that before eight o'clock a servant of the defendant at its city power house, who had the means and the authority to cause the current to be instantly shut off from the circuit in which was the lamp, had received two separate telephonic messages, one informing him that the pole was on fire and the second one that a wire was down there.

They could also find that if in response to the information so received this servant had then caused the current to be shut off from the circuit no accident would have happened and that he could have caused the current to be shut off simply by telephoning to the man in charge at the Indian Orchard power house, and that all that he did toward putting an end to the dangerous condition of things was to order an inspector to go to the place.

The testimony also tended to show that it ordinarily would take from five to eight minutes to go from the place where the inspector was when sent to the place of the accident and would

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have justified a finding that half an hour or more elapsed between the time when the inspector was sent out and the time when the deceased received the fatal shock, and that the inspector did not arrive upon the spot until after the deceased had been injured.

In our opinion the jury properly could find that there was gross negligence on the part of the servant of the defendant at the power house in not ordering the current to be turned off when he received the telephonic messages and on the part of the inspector in not arriving at the scene of the accident in a reasonable time after receiving the order to go thither.

The other requests which were refused relate to the question of due care on the part of the plaintiff's intestate. While the evidence as to his conduct immediately before he received the fatal shock was conflicting, there was evidence which would have justified a finding that he had occasion to pass over the sidewalk which passed next to the electric light pole, and that while upon the sidewalk for that purpose and near the pole and without touching or attempting to touch it he received the fatal shock. We think that in view of this evidence neither of the three rulings requested upon this branch of the case properly could have been given. The rulings given upon this branch of the case seem to us to have been sufficiently favorable to the defendant.

The remaining exception is to the disallowance of the motion for a new trial. So far as appears the defendant voluntarily proceeded after the death of the judge who presided at the trial to have the motion heard by another judge. For this reason the defendant cannot be heard to say that the judge who heard the motion could not deny it.

Exceptions overruled.

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GARFIELD AND PROCTOR COAL COMPANY *vs.* ROCKLAND-ROCKPORT LIME COMPANY.

Suffolk. November 19, 1902. — June 23, 1903.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Ship. Damages. Negligence.

Because the master of a vessel knows that in entering a certain dock he will have to go through some mud he does not take the risk of an injury to his vessel from a ledge of rock embedded in the mud, if in entering the dock he exercises reasonable care.

In an action for an injury to the plaintiff's vessel from grounding on a ledge of rock embedded in the mud at the bottom of the defendant's dock, it appeared that the master before entering the dock reported the draft of his vessel to the defendant's agent in charge of the dock and inquired of him in regard to the depth of the water and the character of the bottom, and was assured by the agent that there was plenty of water and that the bottom was good. *Held*, that the master was justified in relying on the statement of the defendant's agent and was under no obligation to take soundings.

In an action for an injury to the plaintiff's vessel from grounding on a ledge of rock in the defendant's dock, a ruling, that if the defendant was liable the plaintiff was entitled to recover the fair value of the vessel to the plaintiff during the time needed to repair her, was stated by the court to be correct in law, although the finding of the trial judge made it immaterial.

In an action for an injury to the plaintiff's vessel from grounding on a ledge of rock embedded in the mud at the bottom of the defendant's dock, it is not necessary for the plaintiff in order to recover to show that the defendant knew of the ledge if its existence could have been discovered by reasonable diligence.

TORT, by the owner of the coal barge Western Belle, for injury to that vessel by grounding on a ledge of rock embedded in the mud at the bottom of the defendant's dock at Rockland, Maine. Writ dated May 4, 1901.

In the Superior Court the case was tried before *Fox*, J., without a jury. Norton mentioned below was the defendant's foreman at the dock.

The plaintiff requested the judge to make the following rulings:

"1. The master of the Western Belle was justified in relying upon the statement of Norton that the berth was a proper one and was under no obligation to take soundings.

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"2. If the defendant is liable the plaintiff is entitled to recover the fair value of the vessel to the plaintiff during the time needed to repair her.

"3. If Norton, the defendant's wharfinger, stated that the berth was proper for her, the defendant is liable for an injury caused by the vessel's resting on the ledge, although Norton and the defendant were ignorant of the existence of the ledge, if sounding the mud would have disclosed it.

"4. It is not necessary for the plaintiff to show that the defendant knew of the ledge; it is sufficient if its existence could have been discovered by reasonable diligence."

The judge refused to make any of these rulings, and found for the defendant. The plaintiff alleged exceptions.

H. Wheeler, for the plaintiff.

R. M. Saltonstall, for the defendant.

LATHROP, J. The judge of the Superior Court, who tried this case without a jury, found for the defendant, and stated the reasons for his finding. Some of these reasons do not appear to be in accordance with the evidence, nor to be warranted by it; and the judge concludes his subsidiary findings by the statement that the master of the vessel "knew that in order to reach the berth designated, his keel must plough the mud a depth of two feet, and that the bottom would be searched by his barge as it had not been searched by a vessel before." And he ends by saying: "I am of opinion that the loss should rest where it has fallen." There is no finding that the master of the vessel was not in the exercise of due care, and the theory on which the decision apparently rests is that the master took the risk.

We will now point out wherein it seems to us that the judge was not warranted by the evidence in some of his subsidiary findings. In the first place the judge states: "It does not appear that any vessel had ever been in the dock before drawing more than twenty feet of water." Crockett, a witness for the defendant, who was interested in the defendant company, and had charge of its local business at Rockland, testified that prior to June, 1900, when the accident occurred, "the wharf had been used for loading and unloading vessels of all sizes, from small schooners to large ships drawing more than twenty feet." Norton, an employee of the defendant, testified in its behalf that he

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had seen a vessel in this dock drawing more than the plaintiff's vessel, "a vessel that drew twenty-three feet, at least." The judge further says: "The captain of the harbor tugboat employed by the barge told her master that he thought it doubtful whether there was enough water." Holmes, the master of the tugboat, testified "that he told the master of the barge that he thought it was doubtful if there was water enough to go into that berth, and that the master asked him if the bottom was all right there, and Holmes said that it was, as far as he knew." This puts a somewhat different light upon what the judge evidently considered a warning. We are also of opinion that the judge was not warranted in finding that "the master knew that his keel must plough the mud a depth of two feet." There was evidence that the vessel drew "twenty-one feet forward and twenty-two feet aft, and there were figures on her bow and stern indicating the draught." The principal damage to the vessel was just forward of amidships, where the draught would be less than twenty-one feet, six inches.

The judge found that other vessels "had lain there before without injury." There was evidence to warrant a finding that vessels had lain at the dock before without injury, but it does not appear that these vessels had rested on the ledge. While such evidence is often admitted in this class of cases, its admissibility is very questionable. It would seem to come within the rule that the fact that other persons have not suffered by an alleged defect, is immaterial. *Aldrich* v. *Pelham*, 1 Gray, 510. But if such evidence is admissible, to entitle it to any weight, it should appear that the other vessels were of the same length, breadth, and flatness, as was the plaintiff's vessel, and were as heavily loaded as she was. The defendant made no attempt to prove any of these things. The value of such evidence is to show the existence of no defect, but, as was said by Judge Wallace in *Smith* v. *Havemeyer*, 36 Fed. Rep. 927, 928, it becomes quite unimportant when it appears beyond doubt that there are defects capable of producing mischief which could have been readily discovered by proper examination.

The general rules of law which are applicable in cases of this character are the same in England and in this country, and are the same at common law and in admiralty. They are as well

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stated in the case of *Nickerson* v. *Tirrell*, 127 Mass. 236, 239, as perhaps in any case: "The owner or occupant of a dock is liable in damages to a person who, by his invitation express or implied, makes use of it, for an injury caused by any defect or unsafe condition of the dock which the occupant negligently causes or permits to exist, if such person was himself in the exercise of due care. Such occupant is not an insurer of the safety of his dock, but he is required to use reasonable care to keep his dock in such a state as to be reasonably safe for use by vessels which he invites to enter it, or for which he holds it out as fit and ready. If he fails to use such due care, if there is a defect which is known to him, or which by the use of ordinary care and diligence should be known to him, he is guilty of negligence and liable to the person who, using due care, is injured thereby. *Wendell* v. *Baxter*, 12 Gray, 494. *Carleton* v. *Franconia Iron & Steel Co.* 99 Mass. 216. *Thompson* v. *Northeastern Railway*, 2 B. & S. 106. *Mersey Docks* v. *Gibbs*, L. R. 1 H. L. 93." Other cases bearing upon this point are: *Smith* v. *Burnett*, 173 U. S. 430; *Barber* v. *Abendroth*, 102 N. Y. 406; *Barrett* v. *Black*, 56 Maine, 498; *Sawyer* v. *Oakman*, 1 Lowell, 134, *S. C.* 7 Blatchf. 290; *The John A. Berkman*, 6 Fed. Rep. 535; *Pennsylvania Railroad* v. *Atha*, 22 Fed. Rep. 920; *Smith* v. *Havemeyer*, 36 Fed. Rep. 927; *Manhattan Transportation Co.* v. *Mayor*, 37 Fed. Rep. 160; *Union Ice Co.* v. *Crowell*, 55 Fed. Rep. 87. The rule is the same in England. *Gibbs* v. *Liverpool Docks*, 3 H. & N. 164; *S. C. nom. Mersey Docks* v. *Gibbs*, 11 H. L. Cas. 686, and L. R. 1 H. L. 93. *The Moorcock*, 13 P. D. 157, and 14 P. D. 64.

We have examined all the cases cited by the counsel on each side, and also other cases, but we have found none in which the doctrine of the assumption of the risk has been applied. It may however be true that where a master of a vessel knows of a hidden obstruction in a dock and takes his vessel in he acts so carelessly that he may be said to assume the risk. The case of *Christian* v. *Van Tassel*, 12 Fed. Rep. 884, was decided upon the general principles we have stated, but Judge Brown, in giving the opinion, apparently in answer to an argument of counsel, said: "The libellant, in voluntarily moving the boat forward upon what was known to be shoal water, took the risk

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of whatever might result from grounding upon the usual mud bottom, . . . but he did not take the additional risk resulting from the stones, of which he was not apprised and for which the respondent must be held responsible."

It is clear that the vessel was in the defendant's dock on business, and was, therefore, there by invitation. The judge has found, and the evidence shows, that the injury was caused by a ledge of rocks embedded in the mud at the bottom of the dock. The questions of fact which he did not pass upon are whether the master was in the exercise of due care, and whether the defendant knew of the defect or could by the exercise of reasonable care and diligence have ascertained its existence.

If the master exercised reasonable care and the defendant was negligent, it cannot be said that the master took the risk of the ledge merely because he had to go through some mud.

We are of opinion, therefore, that the case was not decided upon the application of proper principles of law, and that there must be a new trial.

The first request we are of opinion should have been given. We are not aware of any case in which it has been held that the master of a vessel which is to lie in a regular berth at a wharf is obliged to take soundings, though such an obligation may be held to exist where a vessel is to take ground at a place where vessels do not usually lie. As to the authority of Norton, it is plain from the evidence that he was the agent of the defendant on the wharf, and gave all the directions to the master that were given in respect to the berth the vessel was to lie at. The master reported to him before the vessel was hauled in, inquired the depth of the water and the character of the bottom. He was assured that there was plenty of water, and the bottom was good. This bears directly upon the question of the due care of the master. There was some attempt to show that Norton was only the general superintendent of certain branches of business, such as loading cars and vessels with lime, "discharging vessels with coal, taking account of cooperage, etc. etc." There is nothing in the evidence to show that the defendant had any one else on the wharf with authority to give directions to vessels coming there, and to answer questions in regard to the depth of water and the nature of the bottom. Indeed there is no evi-

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dence that the defendant directly denied Norton's authority to do all that he did in this case. Norton was ostensibly the person in charge of the wharf, and by a familiar principle of agency, the defendant cannot show that he had only limited authority. *Pennsylvania Railroad* v. *Atha*, 22 Fed. Rep. 920. The request therefore should have been given.

The second request states a correct principle of law, but it is rendered immaterial by the judge's finding. The third request is perhaps stated too broadly. The fourth request should have been given. See cases cited above.

Exceptions sustained.

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d193 134
d194 417
194 418

ELIZABETH JOSLYN *vs.* MILFORD, HOLLISTON AND FRAMINGHAM STREET RAILWAY COMPANY.

Norfolk. March 4, 1903. — June 24, 1903.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Negligence. Street Railway.

In an action by a woman passenger against a street railway company for an injury sustained in alighting from a car of the defendant upon a narrow gravel embankment, if it appears that the embankment was not in a highway but on private land acquired by the defendant and within its exclusive control, that the conductor had stopped the car fifty feet beyond a level crossing at which the plaintiff seasonably had requested him to stop it, that within a few hours loose gravel had been deposited on the embankment, that the plaintiff was not cautioned in any way as to the security of the footing, and that when she stepped with one foot on the edge of the embankment it gave way, causing the injury, there is evidence on which a jury would be warranted in finding that the defendant was negligent in not notifying the plaintiff of the yielding nature of the recently deposited gravel upon its own roadbed where it had invited her to alight. Whether the conductor was negligent in failing to stop at the crossing is immaterial, that not being the proximate cause of the injury.

The provision of R. L. c. 112, § 44, requiring notice of the time, place and cause of an injury incurred in connection with the maintenance of the tracks of a street railway company in a public street, has no application to an action against a street railway company for an accident which occurred on a portion of its roadbed on land not in a highway and within the defendant's exclusive control.

TORT for personal injuries alleged to have been sustained through the negligence of the defendant and its agents and servants while the plaintiff was alighting from a car of the

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defendant, with a second count alleging negligence in causing the car in which the plaintiff was a passenger to be stopped at an unsafe place and not warning the plaintiff thereof but negligently inviting her to alight upon some loose earth or gravel, which caused her to lose her footing, whereby she was injured. Writ dated January 19, 1901.

In the Superior Court the case was tried before *Richardson*, J. At the close of the plaintiff's evidence the judge directed a verdict for the defendant, with an agreement of the parties that after verdict the case should be reported to this court, and if this court should decide that upon the evidence the action could be maintained a new trial should be had for the assessment of damages only. In accordance with this agreement the judge reported the case for determination by this court.

C. C. Mellen, for the plaintiff.

J. C. F. Wheelock, (*W. Williams* with him,) for the defendant.

HAMMOND, J. We understand that this report presents to us the question whether the evidence would have warranted a verdict for the plaintiff.

We think that there was sufficient evidence to go to the jury on the question of her due care, and we do not understand the defendant to contend to the contrary.

The important question is whether there was evidence to warrant a finding of negligence on the part of the defendant, and it is not free from difficulty. The failure of the conductor to stop at the crossing, even if negligent, was not the proximate cause of the injury, and needs not to be further considered. If there was any negligence on the part of the defendant, it is to be found in the circumstances under which the plaintiff left the car.

As to these circumstances there is but little conflict of testimony. The location of the railway for about half a mile was not in the highway but upon private land, bought or leased of the owners by the defendant. The location was about twenty feet wide, was fenced upon each side, and was within the exclusive control of the defendant. For some distance, including the place of the accident, the rails were built upon an artificial gravel embankment, rising two or three feet above the natural surface of the ground, and having the usual slope. Its upper

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edge on either side was substantially parallel with the rails and distant from twelve to fifteen inches outwardly therefrom. The plaintiff seasonably requested the conductor to stop the car at a crossing of a private way called Metcalf's Crossing, where the natural surface of the ground was substantially upon the same plane with the rails, but for some reason he failed to do as requested, and the car was stopped about fifty feet beyond the crossing, upon a part of the embankment above described, for the purpose of permitting the plaintiff and her companion to get out. It was a place over which the defendant had exclusive control. While it is true that it was evident to the plaintiff that this was not a place expressly provided for the landing of passengers, still the act of the conductor in stopping the car was an implied invitation to her to alight, and an implied representation that it was a proper place for that purpose. Since the surface of the embankment extended only twelve or fifteen inches outside the rail, it is plain that in any event the plaintiff, in stepping from the running board, would necessarily place her foot very near the edge. She knew this, but said that she supposed the surface of the embankment was "good solid ground." With this idea she stood upon the running board, stepped with one foot upon the edge of the embankment, the other foot still remaining upon the running board and her hand still clinging to the car, and, while in that position, the embankment gave way and her foot slid down on the side of it, and by reason of this strained position she was hurt. There was evidence tending to show that the gravel upon which the plaintiff stepped had been deposited there only a few hours, with a view to the placing of a switch near there, and the jury might have found that it had not been there long enough to get well settled, and was more liable to give way than if it had remained there a long time. The plaintiff was not cautioned in any way as to the security of the footing, but, as above stated, she was impliedly invited to alight there and impliedly told that it was a suitable place. Of course the case differs from the cases in which the plaintiff alights from a car upon a public street, over which the carrier has no control.

In view of the care required of common carriers for the protection of passengers, we think that the jury would have been

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justified in finding that the defendant should have notified the plaintiff of the yielding nature of the recently deposited gravel, and that without at least such a notification a passenger, especially a woman somewhat advanced in years, as was the plaintiff, was liable to be injured; and that under the circumstances the defendant failed in its duty to exercise reasonable care to protect the plaintiff while alighting from its car by its own invitation upon its own roadbed.

No notice of the time, place and cause of the injury having been given in compliance with the terms of R. L. c. 112, § 44, the defendant contends the action cannot be maintained, but the history and language of that statute show that it was not intended to apply to a case like this, where the accident occurs upon the private property of the defendant. In accordance with the terms of the report there must be a

New trial on the question of damages only.

FRANCES W. FITCH *vs.* VIOLET K. WINDRAM.

Norfolk. March 13, 1903. — June 24, 1903.

Present: KNOWLTON, C. J., LATHROP, BARKER, & HAMMOND, JJ.

Landlord and Tenant.

An agreement in writing under seal for the sale of land, in which no time for performance is specified, giving the purchaser the right to possession and the "use and benefits, profits, income and general rights in said estate", providing that the vendor shall not commit waste or use the property or lease or sell any part of it without the consent of the purchaser, and that the agreement shall be binding upon the heirs, executors, administrators or assigns of each party, and providing also that the purchase money shall include interest on the amount named and taxes, water rates and repairs, is a present grant to the purchaser of the possession of the premises to continue until lost by his default or by the expiration or annulment of the agreement by lapse of reasonable time or otherwise, and gives the purchaser the right to lease the premises to another.

SUMMARY PROCESS under R. L. c. 181, for the possession of five parcels of land at Millis with the buildings thereon. Writ dated May 16, 1902.

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In the Superior Court the case was tried before *Braley*, J., without a jury. He found that the plaintiff was entitled to the possession of the premises described in the writ and ordered judgment and execution therefor. The defendant alleged exceptions.

The judge made certain findings of fact by which it appeared that the plaintiff had acquired possession of the premises under a certain agreement with one Pillsbury dated October 14, 1899, which is printed below. This agreement was made on the same day that Pillsbury acquired his title, and the judge found that Pillsbury was never in the actual possession of and never occupied the premises at any time. On May 19, 1901, the plaintiff being thus in possession leased the premises to the defendant by a lease which expired on April 1, 1902. After June 28, 1901, the defendant refused to pay rent under the lease, having received a notice from Pillsbury not to pay rent to the plaintiff. Before the expiration of the lease the defendant made certain payments to Pillsbury, and after the expiration of the lease and before the date of the writ she paid to Pillsbury a certain sum of money for use and occupation of the premises for one month. The judge found that no demand on the part of either Pillsbury or the plaintiff was made upon the other under the agreement of October 14, 1899, and that the agreement was of full force and effect between the parties to it, that Pillsbury knew of the lease by the plaintiff to the defendant at the time it was made and assented to it, and that the plaintiff never assented to the agreement made between Pillsbury and the defendant.

The agreement of October 14, 1899, was executed under seal by Pillsbury as party of the first part and one Jefferson, an agent of the plaintiff, as party of the second part. The agreement was as follows:

"The party of the first part hereby agrees to sell to the party of the second part or to whom said second party may designate in writing a certain estate situated in Millis, said County and State, being five parcels of land and buildings thereon and bounded as follows:" [Description.]

"Said premises are hereby to be conveyed subject to the existing rights of way as shown in deed of Henry L. Houghton to Carl J. Brunan and to a mortgage to the Medway Savings Bank

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for five thousand dollars, if the same has not already been paid by said second party. Being all and the same property in Millis conveyed by Shepard and Fuller of Lowell, said State, to said second party. Said premises are to be conveyed on demand by a good and sufficient quitclaim deed of the party of the first part, conveying a good and clear title of the same free from all incumbrances made by said first party or suffered to be made by said first party, except as above. For the sum of One Dollars and other valuable considerations to be paid by said second party, in a manner and at times hereinafter mentioned, and the first party further agrees that on demand of said second party or his order, he, said first party, shall and will at the Registry of Deeds for said Norfolk County at Dedham, at noon, or some other place agreed to in writing by the said parties, and upon payment and executing the deed such as stamps making, conveying and recording, and all usual expenses of a conveyance, if any are required. And upon the further payment of said second party of the sum of Four Thousand Dollars and the interest of said sum, at five per cent per annum and the interest on said five thousand dollar mortgage and interest on its interest at five per cent per annum, and the taxes, water rates, repairs, if said second party approves of the same in writing, by said second party his order, his heirs, administrators, and assigns, said first party shall execute and deliver to said second party the above described deed or to his order, being a proper deed of conveyance duly acknowledged for the conveying and assuring to them the fee simple of the premises, free from all incumbrances made by said first party, except as are hereinafter or heretofore agreed upon in writing, at the time and place above mentioned. It is still further agreed that said first party shall or will not suffer any waste of or use of the product of the said estate or receive any benefit therefrom, nor cut any wood therefrom, except he first obtains consent in writing from said second party and first party agrees to give said second party the use and benefits, profits, income and general rights in said estate, and it is agreed that said first party shall not lease, nor rent, nor sell the estate nor any part thereof to any other person, persons, corporations or individuals, or mortgage or incumber the same, or allow it to be incumbered, unless with the consent of the second party, and said first party

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agrees to protect the property against the lawful claims of all parties, and pay if so requested by the Bank, the Medway Savings Bank mortgage. It is further agreed hereby that the above stipulations aforesaid are to apply to and bind the heirs, executors, administrators, or assigns of said second party and said first party. And it is still further agreed that if the party of the first part shall fail or refuse to execute and deliver a proper deed of conveyance in the manner and at the time and place above specified for the purpose, provided the second party shall be ready to fulfil the covenants then to be fulfilled on his part, provided said first party shall be ready to deliver such deed as aforesaid, then the party so failing shall and will pay the other party or his assigns the sum of Twenty-five thousand dollars, which sum is hereby declared, fixed and agreed upon as the liquidating amount of damages by the party so failing as aforesaid for his non performance.

"IN WITNESS the said parties to these presents have hereunto set their hands and seals on this fourteenth day of October, A. D. 1899."

G. R. Nutter, for the defendant.

J. C. Sharkey, for the plaintiff.

HAMMOND, J. The agreement of October 14, 1899, between Pillsbury and the plaintiff was something more than an agreement upon the part of Pillsbury to sell and on that of the plaintiff to buy the land over which this controversy has arisen. Although it is carelessly drawn, yet so far as material to this case its provisions are sufficiently clear.

After describing the land and stating the amount to be paid and the time and manner in which the deed is to be delivered, it is provided that Pillsbury, the party of the first part, shall not suffer any waste or use of the said estate or receive any benefit therefrom, nor cut any wood therefrom except he first obtains consent in writing from the party of the second part, and the former agrees also to give the latter the "use and benefits, profits, income and general rights in said estate." It is also agreed that the former shall "not lease, nor rent, nor sell the estate nor any part thereof . . . unless with the consent" of the latter. It is also expressly provided that the agreement shall be binding upon the heirs, executors, administrators or

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assigns of each party. These provisions taken in connection with those respecting the interest on the amount of the purchase money to be paid, and the taxes, water rates and repairs, all go to show that this was not simply the ordinary agreement for the sale of land, where it is the expectation of the parties that the sale shall be consummated by a deed within the time reasonably required for the examination of the title or some other short period, but was rather an agreement where it was contemplated that the deed might not be called for until after the expiration of months and even years, and hence it was desirable that the rights of the parties as to the possession in the meantime should be fixed.

It is contended by the defendant that there was no intention to create in the plaintiff any term in the land, that there was simply a promise on the part of Pillsbury to convey a fee upon the happening of certain conditions, that until the time came for the delivery of the deed the agreement seems to contemplate that he may be in possession, and that, inasmuch as he holds the title and possession, the relation between him and the plaintiff was that of trustee and *cestui que trust*, with an option of purchase by the latter.

But for reasons stated above we think that this is an agreement for sale, together with an agreement for fixing the rights of the parties as to the possession during the continuance of the agreement; that in language sufficiently clear and precise the right of possession is given to the plaintiff. It is given to her by a sealed instrument and is a legal right. It is not simply an executory promise to give possession, but it is a present grant to the plaintiff of the possession, to continue during the existence of the agreement. The right given is not an estate at will, but a much greater estate, and until it is lost by the default of the plaintiff, or by the expiration or annulment of the agreement by lapse of reasonable time or otherwise, she will continue to hold it. It is stated by the judge before whom the case was tried that no time was specified within which the agreement was to be performed, and his finding for the plaintiff involves a finding that, notwithstanding Pillsbury's conduct as set forth in the bill of exceptions, the agreement was still in force at the date of the writ.

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By the fair interpretation of the agreement the plaintiff was entitled to reap the profits of the income of the estate either by personal occupation or by leasing the same to another. The judge found that Pillsbury knew of the lease and assented to it at the time it was made, and that the lessee entered into the occupation and use of the premises; and the finding of the judge involved a finding that the relation of landlord and tenant existed between the plaintiff and lessee under the lease. It is also further found that Pillsbury was never in the actual possession of the land and never occupied it at any time.

Since the relation of landlord and tenant existed, and since the rights acquired by the plaintiff under the agreement of October 14, 1899, are not shown to have been terminated, the title of Pillsbury to the possession does not seem to be superior to that of the plaintiff, and therefore, even if attornment to the possessor of a paramount title or proof of the expiration of the landlord's title since the lease was given would be a defence to an action of this kind, the facts fail to prove such a defence.

Exceptions overruled.

DONALD CARMICHAEL & another *vs.* HENRY WOOD'S SONS COMPANY & another.

Norfolk. March 12, 1903. — July 7, 1903.

Present: KNOWLTON, C. J., LATHROP, BARKER, & HAMMOND, JJ.

Covenant. Deed. Practice, Civil.

In this suit in equity to restrain the defendants from injuring the plaintiffs' land by maintaining a dam above the height prescribed by the terms of a certain indenture it was *held* that upon the facts stated in the opinion the covenant sought to be enforced did not apply to the parcel of land owned by the plaintiffs.

BILL IN EQUITY, filed December 18, 1901, by the owners of a certain tract of land in Wellesley, containing about twelve acres, against the Henry Wood's Sons Company and the Waban Rose Conservatories, corporations respectively the lessee and owner of a mill dam at the outlet of Morse's Pond, a great pond

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in Wellesley, to restrain the defendants from raising or maintaining the water of Morse's Pond and its outlet above the centre of a certain copper bolt fixed in the masonry of the dam, except for the purposes specified in a covenant contained in a certain indenture, also praying for damages and for further relief.

The plaintiffs derived their title through successive conveyances from one John Jennings, Jr. The title of the Waban Rose Conservatories was derived from Edmund M. Wood. In 1871, when John Jennings, Jr. owned the plaintiffs' land, which Jennings had acquired from the heirs of Daniel Dadmun, and also owned a mill site and certain other parcels of land owned at the filing of the bill by the Waban Rose Conservatories, and when Edmund M. Wood owned a mill and maintained at the outlet of Morse's Pond the mill dam now complained of, Jennings and Wood executed the following indenture, under the terms of which the plaintiffs sought relief:

"This Indenture of the two parts executed in duplicate by and between Edmund M. Wood of Needham and John Jennings, Jr., of Natick, on this twenty-second of November, A. D. one thousand eight hundred and seventy one, Witnesseth: that whereas there have been several matters of controversy between said parties, it is now agreed by and between them, each agreeing in consideration of the agreements of the other, to settle said matters of difference as follows, to wit: First: whereas each of said parties is the owner of a mill and a mill-dam, that of said Wood being in said Needham and that of said Jennings in Natick, and whereas each by his dam aforesaid flows the land of the other, it is hereby agreed as aforesaid by said parties that so far as past damage for flowage is concerned, each party hereby releases to the other his claim therefor. As to future damage it is hereby agreed, that the damage for flowage by one shall offset the damage by flowage by the other, acre for acre, but that if either shall flow more land than the other, the person so flowing an excess shall pay the other yearly as damage therefor, at the rate of four 20/100 dollars per acre, for such excess. Wood's land which is so flowed and to which said agreement applies is a part of the Drury land or farm lying between Oak street in said Natick and the dam known as the old Drury dam as per plan to be made by Austin

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Bacon and heretofore flowed by said Jennings. Jennings' land which is flowed, and to which said agreement applies, is land lying in Needham, easterly of Jennings' Mill near the waterworks, and was bought of heirs of Daniel Dadman (*sic.*). Second: The line between certain lands of said Wood and said Jennings is in controversy, said lands being near said Jennings' mill. The said parties mutually agree as aforesaid that the line between their said lands as established by Austin Bacon, Esq., of said Natick by his award and determination *hereto annexed* and made part thereof, shall forever be the line between said lands. Third: whereas a brook running through said Wood's land empties into the stream below said Jennings' mill, causes at times back water, it is hereby agreed that said Jennings may within one year, enter upon the land of said Wood and make a new channel for said brook; also a new channel for Stevens Brook to a clump of willows, both as staked, filling up the old channel with the earth taken from the new and spreading the remainder of the earth, if any taken out upon the meadow of said Wood. And that said Jennings may always enter upon said land for the purpose of clearing said brook from collections preventing the flow of the water. Fourth: there has been a controversy between said parties as to the height to which said Wood shall maintain his dam below the dam of said Jennings. It is hereby agreed that the water raised by said dam of said Wood except in case of repairs upon the wheels, *floom* or machinery connected with said dam, shall be maintained in the ordinary state of the stream only to the height of the centre of a copper bolt fixed in the masonry of said Wood's new dam at a point five feet one and one-half inches below the top of the westerly end of the capsill of said new dam, said bolt has been inserted in the masonry of said new dam by said Bacon. Fifth: the injunction heretofore issued on the petition of said Jennings restraining said Wood from further work on his dam, etc., it is agreed is hereby dissolved, and the suit shall be entered neither party. Each of said parties enters into the foregoing agreements with the other his heirs and assigns, for himself his heirs and assigns. In witness whereof the said John Jennings, Jr., and Edmund M. Wood have hereto on the day first above written, set their hands and seals."

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The plan and award of Austin Bacon annexed to the indenture are described by the court.

At different stages the case came before several different judges of the Superior Court. On December 19, 1902, that court made the following decree:

"This cause came on to be further heard at this term after the filing of the master's report and was argued by counsel, and thereupon upon consideration thereof it is

"Ordered, adjudged, and decreed that the exceptions of both parties to the master's report be and they hereby are overruled, and that the defendants, Henry Wood's Sons Company and Waban Rose Conservatories, be and they hereby are enjoined from maintaining the water raised by their mill-dam on the outlet stream of Morse's Pond, in Wellesley, in the county of Norfolk, in the ordinary state of the stream above the centre of the copper bolt fixed in the masonry of said dam at a point five feet one and one-half inches below the westerly end of the cap-sill thereof except in case of repairs upon the wheels, flume, or machinery connected with said dam, and that the plaintiffs recover of the defendant, the Waban Rose Conservatories, damages in the sum of $29.75 with interest from Nov. 22, 1901, and their costs to be taxed by the clerk, and that execution issue therefor."

Both the plaintiffs and the defendants appealed from this decree.

F. H. Stevens, (*C. E. Dow* with him,) for the plaintiffs.

E. R. Thayer, (*S. R. Wrightington* with him,) for the defendants.

BARKER, J. The plaintiffs seek in equity to enjoin the lessees and the owners of a water mill from flowing certain tillage land, and to recover damages for past flowing. Ordinarily a mill owner who flows such land is liable merely for damages which are recoverable only under the mill acts. But in the year 1871, the predecessors in title of the parties entered into an indenture under seal purporting to bind each party thereto and his heirs and assigns, and the plaintiffs contend that by reason of this indenture the defendants should be enjoined from raising the water above a certain height, and that entertaining the bill for that purpose the court also should award damages for past flowing.

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When the indenture was made, Jennings owned not only the twelve acres of land now belonging to the plaintiffs but another smaller parcel adjoining it upon the west and two other still smaller parcels which adjoined each other still farther to the west, constituting his mill site, but separated from the first two parcels by land of Wood. On the most easterly of these parcels Jennings had a dam which raised a narrow mill pond, overflowing other land of Wood. Jennings also had two other parcels of land, one very small, circular in shape, and below his pond and surrounded by the land of Wood which separated Jennings's mill site from his lands which lay to the west of it, the other between his pond and Worcester Street and westerly of and adjoining the parcel of Wood's land flowed by Jennings's pond. Jennings's pond and mill were supplied with water only by a brook which from his mill ran into Morse's pond, which was fed also by other brooks. His mill was a saw and grist mill. The Jennings mill and all of the Jennings land except the twelve acre tract are now owned by one of the defendants.

There was another water mill, used for the manufacture of paints, the dam of which raised and controlled the waters of Morse's pond. This mill was owned by Wood the predecessor in title of the defendant who is now the owner of both mill sites. Wood, as stated, also owned land flowed by Jennings's dam. The water raised by Wood's dam flowed Jennings's first mentioned, or twelve acre, parcel of land to some extent, and besides this Jennings contended that a new dam which Wood was erecting would flow out Jennings's water wheels and interfere with the use of his mill. To prevent this injury to his mill he had brought a bill in equity against Wood, which was pending, and upon which a temporary injunction had been issued which prevented Wood from completing his new dam. The bill had no relation to the flowing of the twelve acre tract.

Jennings in respect of his tillage land could not as of right restrict the height of Wood's dam, but if Jennings's mill had a superior right, as he claimed, he could of right prevent the lower dam from raising water so high as to injure his own mill. Jennings could overflow Wood's land to any extent, and Wood had a similar right to flow any of Jennings's land except his mill privilege.

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Besides the controversy dealt with by the equity suit then pending as to the height to which Wood could erect and maintain his new dam without injuring Jennings's mill, and their respective pecuniary claims for compensation for flowing damages, there was also a controversy between them as to a boundary line.

A brook in land of Wood, emptying below Jennings's mill into the brook whose waters supplied that mill, at times caused backwater upon the wheels of Jennings's mill. There does not seem to have been a controversy as to this matter.

Under these circumstances, Jennings and Wood, desiring to settle their controversies, executed the indenture. Since then the ownership of both water privileges and of all the Jennings parcels of land, except the twelve acres, has passed to one of the defendants. The title to the Jennings parcel of twelve acres was bought by the plaintiffs for $300 in 1896, and is held by them.

It was agreed in the indenture that the water raised by Wood's dam, except in case of certain repairs, should be maintained in the ordinary state of the stream only to the height of the centre of a certain copper bolt, and it is conceded that since the plaintiffs have acquired their title the defendants have at times maintained at a greater height water raised by the dam. The plaintiffs contend that the agreement as to the height of water attached to the twelve acres, while the defendants contend that it attached only to the Jennings mill. This is the principal question for decision; and it must be settled by ascertaining the intention of the parties.

Their principal intention was not to arrange a scheme for the development of tracts of land. It was not to create or confer easements, but to adjust mutual pecuniary demands, fix a boundary line, and prevent the injury of an upper by a lower mill privilege. The only dispute as to the height of Wood's dam was at what height it would work injury to Jennings's mill privilege. There was no controversy as to the height to which Wood could raise water so far as the twelve acre tract was concerned, and nothing to prevent Jennings from raising his own dam and thereby appropriating to himself a right to flow under the mill act more of Wood's land lying above.

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The indenture begins with a recital that "whereas there have been several matters of controversy between said parties, it is now agreed by and between them, each agreeing in consideration of the agreements of the other, to settle said matters of difference as follows, to wit"; then follow five clauses headed respectively, "First:" etc., following the last of which is this sentence: "Each of said parties enters into the foregoing agreements with the other his heirs and assigns, for himself his heirs and assigns." Then follows the usual testimonium clause, ending the instrument. The first of the five clauses recites that whereas each party owns a mill and a mill dam and whereas each by his dam flows the land of the other, it is agreed that each party releases to the other his claim for past damages, that as to future damages "the damage for flowage by one shall offset the damage by flowage by the other, acre for acre, but that if either shall flow more land than the other, the person so flowing an excess shall pay the other yearly as damage therefor, at the rate of four 20/100 dollars per acre, for such excess." The clause concludes with two sentences, one of which defines "Wood's land which is so flowed and to which said agreement applies," while the other defines "Jennings's land which is flowed, and to which said agreement applies," and which in fact was merely the twelve acre lot now owned by the plaintiffs.

It is to be noticed that this clause, in which alone the twelve acre parcel is directly mentioned, contains no words which extend the operation of the whole indenture to the matters treated of in this clause. It is not said that "this indenture" applies to the twelve acres, but only that "said agreement applies," namely the agreement as to the rate of compensation per acre for flowing damages and that the damages shall be offset so far as may be and the balance paid yearly. There is nothing in the clause to suggest that either party intended that the right to flow the lands of either should be limited. This controversy as to damages, which they were settling, was only as to flowage by existing mills and from the use of water rights which the parties had already appropriated. Their agreement had no reference to flowage from the use of additional water rights in the future, which the parties might afterwards appropriate, either in connection with the existing mills or with others.

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The next clause is this: "Second: The line between certain lands of said Wood and said Jennings is in controversy, said lands being near said Jennings' mill. The said parties mutually agree as aforesaid that the line between their said lands as established by Austin Bacon, Esq., of said Natick by his award and determination *hereto annexed* and made part thereof, shall forever be the line between said lands." No connection existed between this boundary controversy and that as to the height to which Wood might raise water by his dam. It seems to have been dealt with by the indenture because the dispute was as to a boundary of Wood's land flowed by Jennings's dam and because the parties were settling, as they recited in the beginning of the indenture, "several matters of controversy." The presence of such a clause favors the idea that each of the agreements in the indenture was an independent covenant not designed to affect all of the matters treated of in the other clauses, and that the reason for bringing them into one indenture was that each agreement of either party was a consideration for the agreements of the other.

The third clause gave Jennings the right to change and keep open a channel for a brook on Wood's land. There does not appear to have been any controversy existing about this brook, and there was no connection between the subject of the clause and either of the controversies which was settled by the indenture. Apparently it was an independent agreement.

The fourth and fifth clauses are as follows: "Fourth: there has been a controversy between said parties as to the height to which said Wood shall maintain his dam below the dam of said Jennings. It is hereby agreed that the water raised by said dam of said Wood except in case of repairs upon the wheels, *floom* or machinery connected with said dam, shall be maintained in the ordinary state of the stream only to the height of the centre of a copper bolt fixed in the masonry of said Wood's new dam at a point five feet one and one-half inches below the top of the westerly end of the capsill of said new dam, said bolt has been inserted in the masonry of said new dam by said Bacon. Fifth: the injunction heretofore issued on the petition of said Jennings restraining said Wood from further work on his dam, etc., it is agreed is hereby dissolved, and the suit shall be entered neither party."

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The natural interpretation of these two clauses is that they deal with only the controversy which had been carried into court as to the height to which water could be raised by the lower dam without injuring the upper mill privilege, and that they merely were meant to compromise that controversy by allowing Wood to complete his new dam as he proposed, but restricting its full use. In respect to the twelve acres Jennings had no right to restrict the height of the lower dam. Part of that tract would be flowed when the water in the lower dam was at the height of the centre of the copper bolt, and more when there should be higher water than in the ordinary state of the stream, and when repairs were being made. The method of adjusting the damages for the flowing of the tract had already been settled and laid down in the first clause of the indenture. Jennings would not be likely to seek to attach to an unimportant tract disconnected with his own mill privilege, an easement to control the operation of Wood's dam; and Wood would be very unlikely to grant a new easement of that character to be attached to such a parcel of land or to extend such a right over his own mill privilege to any land except to the Jennings mill privilege, to which, as it was contended, the right was already attached.

The absence from the first clause of any reference to the restriction imposed by the fourth clause, the separation of the first and fourth clauses by the second and third, relating to other matters, and the fact that the fourth clause begins with a recital which implies that the one of the several controversies to be dealt with in it is "a controversy between said parties as to the height to which said Wood shall maintain his dam below the dam of said Jennings," and the improbability that Jennings would ask or Wood consent to attach to the twelve acres an easement which would limit the use of Wood's dam, in our view, all tend to the conclusion that both parties meant that the agreement stated in the fourth clause should be only for the benefit of the upper mill.

Some weight in the same direction may be given to the facts that in the second clause there is a stipulation that the boundary thereby established "shall forever be the line between said lands," and in the third clause a stipulation that Jennings "may always enter upon said land for the purpose of clearing said

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brook," while there is no similar language in the fourth or the first clause. We think that this settlement of flowing damages was made in reference to the then existing conditions and to water rights then in use by the parties, and that as to damages to either party from the appropriation of new rights, by raising a dam or otherwise, the agreement has no application, the parties being left to their rights under the mill act.

Attached to and recorded with the indenture is another document which seems to be twice referred to in the indenture, first in the first clause in the description of Wood's land flowed by Jennings's dam, by the words "as per plan to be made by Austin Bacon," and next in the second clause by the words "as established by Austin Bacon, Esq., of said Natick by his award and determination *hereto annexed*." The document is a broadside on which are two plans, one entitled "Plan of land flowed by E. M. Woods Mill. Estimated on ground at 2½ acres," the other "A plan of land flowed by John Jennings Mill, belonging to E. M. Wood. Estimated on the ground at 1 acre, 16 rods," and this statement: "These Plans to be used to determine payment by E. M. Wood of a sum of money, as per Agreement between Wood & Jennings Recorded Middlesex Lib 1187 Fol 584. Norfolk Lib 416 Fol 152. Excess per Agreement One Acre 64 Rods. Annual payment of Woods to Jennings Five Dollars & 88/100," which is signed "Austin Bacon," while below his signature are the words "Accepted by" and the signatures bracketed of "John Jennings Jr." and of "Edmund M. Wood." On the plan of "Land flowed by E. M. Woods Mill" is a set of two irregular parallel lines meant to indicate the course of a brook, near which lines are the words "This Brook is the line," and this we take to be the award of Austin Bacon as to the disputed boundary referred to in the second clause as annexed to the indenture. This document is minuted as received for record at Dedham "Dec. 29, 1871," while the indenture is minuted as received at the same registry "Nov. 29, 1871."

We see in this document nothing to support the plaintiffs' contention that the agreement of the fourth clause that except in case of repairs the water raised by Wood's dam shall be maintained in the ordinary state of the stream only to a certain height, was intended to be attached to the twelve acres. We

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assume that the plan upon the broadside entitled "A plan of land flowed by John Jennings Mill, belonging to E. M. Wood" is the plan referred to in the first clause as "plan to be made by Austin Bacon," and this and the reference to Austin Bacon's award as to the boundary made it by reference a part of the indenture. As matters then stood, the ordinary flowage by Wood's dam would be fixed by the stage of the water when at the height limited by the fourth clause of the indenture, and it was natural that the parties in settling their controversies as to flowing each other's lands by their dams as they then were should have Bacon make and that they should preserve the data which would enable them to know what annual payment ordinarily must be made by one to the other as matters were then adjusted between them. No support of a limitation upon Wood's right to flow the twelve acre tract can be derived from the contents of the broadside.

From the record of the case we assume that although the evidence was taken and reported by a commissioner under Chancery Rule 35, the cause was also sent to and heard by a special master whose report was filed on October 28, 1902, and that both parties excepted to the report of the special master, and that the exceptions of both parties were overruled by the judge, whereupon each party appealed. In the report of the commissioner it appears that the plaintiffs called a witness, Stevens, who testified "Yes, sir," to a question whether he "ever had a conversation with Edmund M. Wood in regard to the flowage of this land." Thereupon counsel for the plaintiffs stated that Edmund M. Wood was a party to the indenture and was deceased, and that counsel wanted to put in evidence a conversation that the witness had with Wood in regard to the flooding of the land to show the practical interpretation of the covenant. The report does not state the conversation or its substance.

The commissioner's report also shows that one of the plaintiffs, when upon the stand, was asked by his counsel whether he ever had a conversation with Edmund M. Wood, counsel stating that he wanted to show the declaration of one of the parties to the covenant, and that the evidence was excluded. Here again the commissioner's report contains no statement as to what the declaration of Wood to the witness was.

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The plaintiffs now contend that Wood had admitted the plaintiffs' right to have the water kept not above the centre of the copper bolt, and that the evidence excluded ought to have been admitted and that it ought to be considered in construing the indenture.

The case as it is before us must be disposed of without regard to the evidence offered and excluded. We cannot know what the declarations of Wood were, and therefore cannot say that they were competent or relevant.

Therefore we are compelled to construe the indenture of 1871 looking to its own language, to the document annexed to it, and to the situation of the parties to it when it was made. So looking at the instrument we are of opinion that the agreement as to the dam then owned by Wood, contained in the fourth clause of the indenture, was not intended by the parties to attach to and did not attach to the twelve acres of land now owned by the plaintiffs.

The result is that the plaintiffs have shown no right to have the height of the water raised by the dam owned by one of the defendants and leased to the other restricted, and that as they have no right to equitable relief by injunction the decree in their favor should be reversed and their bill dismissed by the lower court.

Holding this view, we see no reason why we should discuss the other questions raised by the exceptions of both parties to the master's report, and by their appeals from the final decree, or by the defendants' appeals from the overruling of their demurrers.

Decree to be entered in the Superior Court reversing final decree for plaintiffs and dismissing the bill with costs.

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GERTRUDE M. POWERS & others *vs.* MARY E. RAFFERTY & others.

Middlesex. March 16, 1903. — July 9, 1903.

Present: KNOWLTON, C. J., LATHROP, BARKER, & HAMMOND, JJ.

Devise, Construction.

A testatrix having shown by other parts of her will a disposition to treat two of her daughters, M. and A., equally, gave to M. one half of certain real estate in fee, and then provided as follows: "I give, devise and bequeath to my said daughter M. the other undivided half of my said real estate, to have and to hold to her and her heirs and assigns forever, but in trust nevertheless for the use and benefit of my daughter A.; it being my desire that my said daughter A. should have the full benefit of said undivided half, but to have no power to dispose of the same by deed or otherwise." *Held*, that A. took an equitable fee in the undivided half of the real estate, which on her death became executed in her heirs by the statute of uses, so that they became seised of the legal estate as if she had died seised in fee simple.

PETITION, filed January 5, 1903, for partition of certain real estate on Thorndike Street in Cambridge, formerly owned by Sarah Banfield and disposed of by her will, being the only real estate mentioned therein.

The case was tried in the Superior Court before *Richardson*, J., without a jury. He reported it for determination by this court. If upon the facts found by the judge the petitioners were entitled to have partition made, the usual interlocutory judgment that partition be made of the shares to which the petitioners were entitled was to be entered; otherwise, the petition was to be dismissed or such other judgment entered as the law required.

The will of Sarah Banfield, omitting the introductory clause, was as follows:

"First. I hereby constitute and appoint my daughter Mary E. Rafferty of said Cambridge, sole executrix of this my last will and testament and it is my earnest desire that she be exempt from giving any surety or sureties on her official bond or bonds.

"Second. I give devise and bequeath to my said daughter Mary E. Rafferty one undivided half part of my real estate

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on Thorndike Street aforesaid, to have and to hold to her and her heirs and assigns forever.

"Third. I give, devise and bequeath to my said daughter Mary E. the other undivided half of my said real estate, to have and to hold to her and her heirs and assigns forever, but in trust nevertheless for the use and benefit of my daughter Adelaide G. Powers of said Cambridge; it being my desire that my said daughter Adelaide should have the full benefit of said undivided half, but to have no power to dispose of the same by deed or otherwise, and I request that no surety or sureties be required from my said daughter Mary E. in the execution of said trust.

"Fourth. I give to my daughter Sarah J. McGrath, wife of Daniel L. McGrath of said Cambridge all my government and other bonds.

"Fifth. I give to my daughter Delia E. Egan the sum of three hundred dollars ($300) out of my deposit in the East Cambridge Five Cents Savings Bank.

"Sixth. I give to my son Thomas E. Rafferty, now of California, the sum of one dollar.

"Seventh. I give to my granddaughter Gertrude Mary Powers of said Cambridge my piano, stool and cover.

"Eighth. I give, devise and bequeath to my said daughters Mary E. and Adelaide all my household furniture and all the rest and residue of estate real, personal and mixed wherever situated of and to which I may die seized, possessed, or in any way entitled to, to have and to hold to them in equal shares.

"In witness whereof I hereunto set my hand and seal this eighth day of January, A. D. 1893."

J. H. Ponce, for the petitioners.

M. F. Farrell, for the respondent Mary E. Rafferty.

H. Dunham, for the other respondents.

HAMMOND, J. This is a petition for partition of the real estate specifically named in the second and third clauses of the will of Sarah Banfield, who, being seised of the same, died in 1893, leaving as her only heirs and next of kin four daughters, Adelaide, Sarah, Delia and Mary, and one son, Thomas. Adelaide died intestate in 1898, leaving a husband, Nicholas P. Powers, who is one of the petitioners, and as her only heirs

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and next of kin two children, Gertrude and John, minors, who, through a guardian, are the other petitioners.

The case calls for the construction of the third clause of the will, which reads as follows: "I give, devise and bequeath to my said daughter Mary E. the other undivided half of my said real estate, to have and to hold to her and her heirs and assigns forever, but in trust nevertheless for the use and benefit of my daughter Adelaide G. Powers of said Cambridge; it being my desire that my said daughter Adelaide should have the full benefit of said undivided half, but to have no power to dispose of the same by deed or otherwise, and I request that no surety or sureties be required from my said daughter Mary E. in the execution of said trust."

The petitioners contend that under this clause the undivided half named therein was devised to Mary in trust for the benefit of Adelaide, and that upon the death of the latter it descended to her children in equal shares, subject to the estate by the curtesy in the husband, free and discharged of the trust.

The respondent Mary, however, contends that this undivided half was devised to her in trust to hold for the benefit of Adelaide only during her life, and that upon her death the trust ceased and the remainder fell into the estate of the testatrix and became a part of the residue bequeathed in the eighth clause of the will to the said Mary and Adelaide in equal shares, so that the petitioners, who upon this view take only under this last clause, are seised of only one half of this undivided half or only one quarter of the land, while Mary, receiving one half under the second clause and one quarter under the eighth clause, is seised in fee of three undivided fourths of the land.

The other respondents, being the remaining children of the testatrix, contend that under the third clause Mary took an estate for the life of Adelaide, that the remainder was not disposed of by the will, and therefore vested in the children of the testatrix in equal shares.

The testatrix in the first clause appoints her daughter Mary sole executrix, requesting that she may be exempt from giving bonds, thereby indicating her confidence in her. In the second clause she bequeaths one half of this real estate to Mary in fee,

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using the technical words apt to describe such an estate. Then comes the clause which is to be construed. The devise to Mary is in words apt to create a fee, but since it is an estate in trust the legal estate will be commensurate only with the trust. The trust is "for the use and benefit" of Adelaide. Then follows the expression of the desire that Adelaide "should have the full benefit of" this half, but should "have no power to dispose of the same by deed or otherwise." Then follow clauses making certain specific bequests to the three remaining children, and to the grandchild Gertrude, who is one of the petitioners; and the will ends with a general residuary clause in favor of Mary and Adelaide, in which they take in equal shares.

In view of the intention shown in other parts of the will to treat Mary and Adelaide equally and upon a plane different from that of the other children, of the express language of the third clause that Adelaide should have the full benefit of this half, limited only as to the power of disposal of it during her life, and of the absence of any special devise over of this half after her death, we are of opinion that it was the intention of the testatrix that this half should go to the use and benefit of Adelaide and her heirs substantially as the other half went to Mary and her heirs; and that the only reason for putting it in trust, instead of giving the legal estate to Adelaide, was that Adelaide might not have the power to convey the legal estate in her lifetime; and that therefore Adelaide took an equitable fee. See *Fay* v. *Phipps*, 10 Met. 341; *Chauncey* v. *Francis*, 181 Mass. 513; *Chauncey* v. *Salisbury*, 181 Mass. 516.

We are also of opinion that the trust continued only during the life of Adelaide, and that at its determination upon her death the equitable use in the remainder became executed in her heirs by the statute of uses, so that they became seised of the legal estate as if she had died seised in fee simple. See *Richardson* v. *Stodder*, 100 Mass. 528, and cases there cited; *Moore* v. *Stinson*, 144 Mass. 594; *Cushing* v. *Spalding*, 164 Mass. 287.

The petitioners being thus seised, the petition can be maintained, and the interlocutory judgment that partition be made should be entered.

So ordered.

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MARTHA E. JONES, administratrix, *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. December 11, 1902. — September 1, 1903.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Negligence. Railroad.

In an action under the employers' liability act against a railroad company for the death of the plaintiff's intestate, an engineer on an express freight train, killed by his train running into a construction train, it appeared, that the train under charge of the plaintiff's intestate consisted of a heavy locomotive and forty-four cars, some of them heavily loaded, that it was on a heavy down grade where it was not customary to use steam under similar circumstances but that the intestate was using steam to make up time and was running at a rate of from eighteen to twenty-five miles an hour, that the rules required him to be "vigilant and cautious, not trusting alone to signals or rules for safety", that the stationary signal nearest to the construction train was seventeen hundred and fifty feet from it, that a flagman went back from the construction train upwards of two thousand feet and beyond this signal and could have been seen for a considerable distance, that the intestate tried to stop his train but, although he checked its speed somewhat, it ran past the flagman to the place of the collision where it struck the construction train with such force as to throw the locomotive of the freight train from the track and wreck seventeen cars. *Held*, that, assuming that the flagman was a person having charge of a signal, under St. 1887, c. 270, § 1, cl. 3, and that he was negligent in not going back as far as required by the rules, and also assuming that there was negligence on the part of the defendant in omitting to warn the plaintiff's intestate of the presence of the construction train, there was no evidence that the plaintiff's intestate was in the exercise of due care.

TORT, under St. 1887, c. 270, and acts in amendment thereof and in addition thereto, by the administratrix of the estate of Roger P. S. Jones, for the death of the plaintiff's intestate. Writ dated August 8, 1899.

In the Superior Court the case was tried before *Richardson*, J., who at the conclusion of the plaintiff's evidence, at the request of the defendant, ruled that the plaintiff was not entitled to recover, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

J. Bennett, (*D. W. Reid* with him,) for the plaintiff.

C. F. Choate, Jr., for the defendant.

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MORTON, J. The plaintiff's husband was an engineer in the service of the defendant company, and was killed in a collision between his train, which was an express freight bound to Boston, and a construction train near what is called the Dedham road from two to two and a half miles towards Boston from Canton Junction. This is an action by the plaintiff as administratrix of her husband's estate to recover damages under St. 1887, c. 270, and acts in amendment thereof, for his injuries and death. The declaration is in five counts, but the grounds of recovery chiefly relied on, are, that there was evidence tending to show negligence on the part of the defendant and of the servants in charge of the construction train and of the locomotive attached to it, in suffering the train and the locomotive to be where they were at the time of the accident, without warning or notifying the plaintiff's intestate of its presence, and also that there was evidence tending to show negligence on the part of one Morse, who had charge of signal flags and torpedoes, in not going back from the construction train as far as required by the rules to warn approaching trains of the danger. During the trial some evidence was offered by the plaintiff which was excluded, and the plaintiff excepted. At the conclusion of the plaintiff's evidence the judge directed a verdict for the defendant. The case is here on exceptions by the plaintiff to the exclusion of the evidence that was offered, and to the ruling directing a verdict for the defendant.

The exceptions to the exclusion of evidence have not been argued and we therefore treat them as waived. We think that the ruling directing a verdict for the defendant was right and that the evidence showed that the plaintiff was not in the exercise of due care.

The train to which the locomotive of the deceased was attached consisted of forty-four loaded cars and a caboose. Some of the cars at least, if not all, were heavily loaded. The locomotive was also a heavy locomotive. The grade from Canton Junction to the place of collision was a heavy, down grade, and the evidence showed that it was not customary to use steam going down it, unless the train had stopped at Canton Junction which the train of the deceased did not do on the morning of the accident. The train was three hours late and there was un-

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contradicted testimony tending to show that the plaintiff's intestate was making up time, and was using steam as he ran down the grade towards the place of the accident. The construction train was on a curve, and the testimony left it somewhat uncertain how far it could be seen in the direction of Canton Junction. But it seems clear that it could have been seen about a third of a mile at least, though that is not very material. Between the place of the accident and Canton Junction were two banjo signals as they are termed. The signals were operated by electricity from batteries placed along the roadbed. If within the sphere of their operation the track was unobstructed the signals showed white. If it was obstructed they showed red. The nearest of these signals to the place of collision was about seventeen hundred and fifty feet from it and the other was about a mile still further towards Canton Junction. These signals were intended to convey warnings of obstructions only within the sphere of the operation of each signal. Neither signal was intended to warn approaching trains of obstructions or dangers within the sphere of operation of the other signal. The fact that the signal nearest Canton Junction was, as the testimony tended to show, at safety, did not show whether the track was or was not obstructed beyond the other signal. The testimony tended to show that the flagman went back upwards of two thousand feet from the construction train and beyond the signal nearest to the place of collision. Just how far he could or ought to have been seen by the plaintiff's intestate is not clear, but it is manifest that he could or ought to have been seen for a considerable distance. The testimony tended to show that the plaintiff's intestate endeavored to stop his train, and did check the speed somewhat, but the train was going at such a rate of speed that he was unable to stop it, and it ran the whole distance between the flagman and the place of the accident and collided with the construction train with such force as to throw the locomotive of the freight train from the track and to wreck seventeen cars so badly that they had to be burned where they were in order to clear the track. The testimony tended to show that the plaintiff's intestate was running from eighteen to twenty-five miles an hour. There is nothing to show that he was required to make up time or to run at the rate of speed at which he was

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running. The rules required him to "be vigilant and cautious, not trusting alone to signals or rules for safety." Assuming, without deciding, that the flagman was a person in charge or control of a signal within the meaning of the statute, and that he was negligent in not going back as far as required by the rules, and also assuming, without deciding, that there was negligence on the part of the defendant in omitting to warn the plaintiff's intestate of the presence of the construction train, we think that under the circumstances his train was going at an excessive speed and that the accident would or might have been avoided by the exercise of due care on his part, and therefore that the plaintiff is not entitled to recover.

Exceptions overruled.

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RUSSELL S. BENT *vs.* CHRISTOPHER STONE.

Middlesex. December 12, 1902. — September 1, 1903.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Poor Debtor. Officer. Pleading, Civil. Interest.

In an action upon a poor debtor's recognizance the presiding judge in his discretion may allow the introduction in evidence of an amendment made by a special justice of a district court of the record of his court while the action on the recognizance is pending, stating that when he took the recognizance in question he was holding court in the absence of the standing justice.

In an action on a poor debtor's recognizance, if it appears by the record of a district court that four executions were issued and the debtor was arrested on the fourth, and that a certificate of arrest was made by a justice of the court and attached to the second execution, and a certified copy of that certificate was attached to the execution on which the arrest was made, and it does not appear that no oath or affidavit was made and no objection seems to have been taken by the debtor when arrested that the arrest was unlawful because there was no oath or affidavit, it may be assumed that there was an oath or affidavit which justified the certificate of arrest.

In an action against a surety on a poor debtor's recognizance, if it appears by the return of a deputy sheriff on an execution that he arrested the debtor and brought him before a certain district court where he was admitted to bail, the defendant cannot be allowed to contradict this return by showing that the deputy sheriff allowed the debtor to be taken from his custody by a constable not qualified to serve civil process and exercised no further control over him, thus permitting an escape.

A recital in a poor debtor's recognizance that the debtor has been arrested on exe-

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cution by virtue of Pub. Sts. c. 162, and desires to take the oath for the relief of poor debtors, will be taken to refer to the statute as amended.

In an action upon a poor debtor's recognizance taken before a special justice of a district court, it is not necessary that the recognizance should state the facts which gave the special justice jurisdiction, or that they should be set forth in the declaration, if they appear by the record of the district court.

In an action against the surety on a poor debtor's recognizance, if the plaintiff is entitled to recover the full amount of the penalty of the recognizance he may recover interest thereon from the date of the writ.

CONTRACT against a surety on the recognizance of one John Berry, a poor debtor, taken by the first special justice of the First District Court of Eastern Worcester. Writ dated March 18, 1898.

In the Superior Court the case was tried before *Lawton*, J., without a jury. The recognizance was in the sum of $400. The plaintiff had obtained judgment against Berry for an amount in excess of this sum.

The judge ruled that the plaintiff could not recover, refused all the rulings requested by the plaintiff and found for the defendant. The plaintiff excepted, and the judge reported the case for determination by this court. If upon the evidence the judge was not justified in finding a breach of the recognizance, judgment was to be entered for the defendant. If on the evidence as it stood, or as it would stand after striking out any evidence objected to and inadmissible, the plaintiff was entitled to recover, judgment was to be entered for the plaintiff in the sum of $400, and interest from the date of the writ if the plaintiff was entitled to it; otherwise, judgment was to be entered on the finding for the defendant.

W. R. Bigelow, for the plaintiff.

C. F. Choate, Jr., for the defendant.

MORTON, J. This is an action upon a poor debtor's recognizance. The breach relied on is that the debtor "did not appear and submit himself to examination according to the terms of said recognizance." The case was tried by a judge of the Superior Court without a jury. The answer set up amongst other things that the signature of the defendant to the recognizance was obtained by fraud and deception practised on him by the debtor, that the true nature of the recognizance was concealed from him, and that its obligation was not explained

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to him; all of which, it is alleged, was fraudulently known to and consented to by the plaintiff. The judge found that no deception was practised, and that the defendant understood the nature of the recognizance. The judge also found as a fact that there had been a breach of the recognizance. At the conclusion of the whole case the judge found and ruled that the plaintiff could not recover, and refused the rulings asked for by the plaintiff, and found for the defendant.

The plaintiff duly excepted to the refusal of the judge to give the rulings requested. The case is here on a report by the presiding judge: "If upon the foregoing evidence [i. e. the evidence contained in the report] the court was not justified in finding a breach of the recognizance, judgment is to be entered for the defendant; if on the foregoing evidence as it stood, or as it would stand after striking out any evidence objected to and inadmissible, the plaintiff was entitled to recover, judgment is to be entered for the plaintiff in the sum of $100, and interest from the date of the writ if the plaintiff is entitled to it; otherwise judgment is to be entered on the finding for the defendant."

The first ruling requested by the plaintiff was that, "If the court finds that John Berry [the debtor] did not deliver himself up for examination, as required by the condition of his recognizance, then upon all the evidence the plaintiff is entitled to recover as a matter of law." This covers the whole case, and in the view which we take of the case, it is unnecessary to consider particularly the other rulings requested by the plaintiff.

Without going into the evidence in detail, we deem it enough to say that, it seems to us clear that it justified the finding that there was a breach of the recognizance. If the debtor had submitted himself for examination it is reasonable to suppose that some notice or information of that fact would have come to the knowledge of the plaintiff or his counsel or the officer holding the execution. It is a fair inference from the evidence that no such notice or information was received, and therefore that the debtor did not submit himself for examination as required.

The recognizance was taken by the first special justice of the

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First District Court of Eastern Worcester at Westborough, but it does not show that it was taken by him while holding court in the absence of the standing justice. It was agreed that the only docket entries of that court in reference to the case were as follows: "Case No. 40, 1896. Russell S. Bent *v.* John Berry. July 29, 1896, ex'on filed and oath; notice issued ret. Aug. 10, '96. Aug. 10, neither party appeared. July 14, 1897, ex'on r't'd for renewal." And relying upon *Stack* v. *O'Brien*, 157 Mass. 374, the defendant contends that the recognizance is invalid. The special justice had no authority to take the recognizance except while sitting as a court in the absence of the standing justice and that fact should appear of record. *Stack* v. *O'Brien*, *ubi supra*. *Commonwealth* v. *Fay*, 151 Mass. 380. But at a former trial the special justice had been allowed, on his motion, to amend the records of the court, as they appeared in relation to the taking of the recognizance, by stating that he was present and holding court on account of the absence of the standing justice and at his request. It was within the power of the judge to allow this amendment (*Commonwealth* v. *Carney*, 158 Mass. 444, *Commonwealth* v. *Quirk*, 155 Mass. 296, *Dewey* v. *Peeler*, 161 Mass. 135), and the record as thus amended must be taken to be the true record, and to show that the recognizance was properly taken. The special justice did not derive the power to amend the records of his court from the action of the Superior Court. As special justice he had that authority. The only effect of the motion and its allowance was to introduce the amendment into the pending case. Whether the motion should be allowed was a matter within the discretion of the presiding judge, and it must be presumed that he found that the record had been or should be amended as set forth. In addition to this there was also a certificate from Mr. Fowler, who had subsequently been appointed justice of the court, certifying to a copy of the record which contained the same things. The letter of Mr. Fowler, if offered for the purpose of contradicting the record, was inadmissible. *May* v. *Hammond*, 146 Mass. 439.

The defendant also contends that the record of the district court shows that no oath or affidavit was made which justified the issuing of a certificate of arrest. The record is imperfect in

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respect to this matter as well as in respect to the issuing of the certificate. But it is agreed that four executions were issued and that the arrest was made on the fourth. It is also agreed that a certificate of arrest was made by the justice of the court and attached to the alias or second execution, and that a copy of that certificate, duly certified to by the assistant clerk of the Municipal Court of the City of Boston from which the executions issued, was attached to the execution on which the arrest was made. It does not appear that no oath or affidavit was made, and no objection seems to have been taken by the debtor when arrested, that the arrest was unlawful because there was no oath or affidavit. We think that it must be assumed that there was such an oath or affidavit. The annexing of the copy of the original certificate to the execution was in accordance with the statute. R. L. c. 168, § 20.

The defendant further contends that there had been an escape which continued at the time when the recognizance was taken and that the recognizance was invalid for that reason. In reference to this, evidence was admitted against the objection and exception of the plaintiff which tended to show the following facts. When arrested and taken before the special justice the debtor desired an opportunity to give bail. Thereupon the justice directed a constable of Westborough, who was not qualified to serve civil process, to take the debtor to an adjoining town to obtain bail, and he did so, and returned to the court room with him. Upon his return the debtor was placed in the dock and then admitted to bail. The deputy sheriff who made the arrest retained the execution all the time and was present when the justice directed the constable to take the debtor to the adjoining town to enable him to procure bail and also when the constable returned with the debtor, and the latter was placed in the dock and admitted to bail. There was testimony tending to show that after the justice had directed the constable to take the debtor into his custody and go with him to get bail, the deputy sheriff exercised no further control or restriction over the debtor, and assumed no further responsibility in reference to him. The deputy's return on the execution was as follows: "Worcester ss. January 22, A. D. 1898. By virtue of this execution and for want of goods or estate of the within named John Berry (and by

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virtue of the certificate hereto annexed), I have arrested the body of the said John Berry and brought him before the First District Court of Eastern Worcester, at Westborough, and he was admitted to bail by said court. Francis D. Newton, Deputy Sheriff." It would seem that what took place constituted or might have been found to constitute an escape. *Benton* v. *Sutton*, 1 B. & P. 24. 2 Dane's Abr. 622. 3 Bacon's Abr. 396.

If the arrest had been on mesne process it might have been different. *Stevens* v. *Jackson*, 6 Taunt. 106. But the plaintiff contends that the evidence tending to show an escape was improperly admitted, and that it was inadmissible because contradicting the return. And in this we think that he is right. The return is conclusive, as between the parties and their privies, that the debtor was duly arrested and duly admitted to bail. If the defendant has any remedy, it must be in an action against the officer for a false return. *Simmons* v. *Richards*, 171 Mass. 281, and cases cited.

The recognizance is dated January 22, 1898, and recites that, "whereas, the said John Berry has been arrested on execution . . . by virtue of the one hundred and sixty-second chapter of the Public Statutes of said Commonwealth, and desires to take the oath for the relief of poor debtors. . . . Now if the said John Berry shall . . . deliver himself up for examination . . . giving notice of the time and place thereof, as in said statute provided," etc. And the defendant still further contends that the recognizance is void because taken under a statute which had been amended in particulars essentially affecting his rights and no reference is made to the amending statutes. St. 1888, c. 419. St. 1889, c. 415. But we think that the statute referred to must be taken to be the statute as amended. Pub. Sts. c. 162, had no force or effect except as amended. The amendments constituted a part of it (*Fitzgerald* v. *Lewis*, 164 Mass. 495), and the reference to the Public Statutes was sufficient. It is not contended that the statute as amended was not complied with. We have assumed, without deciding, that the amendments materially affected the defendant's rights.

It is suggested that there was a variance between the pleadings and the proof and one of the requests of the defendant was that the judge should so rule. We do not think that there was

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any variance. It was not necessary that the recognizance should state the facts which gave the special justice jurisdiction, or that they should be set forth in the declaration. It was sufficient if they appeared of record (R. L. c. 160, § 41,) and they did so appear upon the amended record.

We have considered all the objections argued by the defendant and the result is that we think that the plaintiff is entitled to recover, and we do not see why he is not entitled to interest from the date of the writ. See *Whitehead* v. *Varnum*, 14 Pick. 523. In accordance with the terms of the report the entry will be judgment for the plaintiff for $400 and interest from the date of the writ.

So ordered.

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EARL CARPENTER AND SONS COMPANY *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.
GORHAM MANUFACTURING COMPANY *vs.* SAME.

Suffolk. January 26, 1903. — September 1, 1903.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND, LORING, & BRALEY, JJ.

Practice, Civil.

A plaintiff has a right to become nonsuit when a hearing before an auditor has been finished but the auditor's report has not been filed.

TWO ACTIONS OF CONTRACT OR TORT, under St. R. I. June 20, 1836, § 2, for damage to property of the respective plaintiffs at Providence in the State of Rhode Island by fire alleged to have been communicated from engines of the defendant. Writ dated September 18, 1899.

In the Superior Court on June 19, 1901, on motion of the defendant both cases were referred to Henry S. Dewey, Esquire, as auditor. Both parties agreed to his appointment. Hearings were had before the auditor, extending over a period of about six months. Evidence was introduced by both sides on all questions involved in the cases, and the defendant incurred an expense

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exceeding $200 in bringing witnesses from Rhode Island to testify.

On January 25, 1902, the hearings were completed and the cases were argued by counsel before the auditor. On April 8, 1902, before the auditor had filed his reports, the plaintiff in each case filed a motion to become nonsuit. On October 16, 1902, the auditor filed his reports, finding for the defendant in both cases. On November 24, 1902, the plaintiffs' motions were heard by *Braley*, J., who ruled, against the objection of the defendant, that as a matter of law no trial had been begun within the meaning of the rule as to the right to become nonsuit at any time before trial, and that the plaintiff in each case had an absolute right to become nonsuit, and so ordered. He stayed all proceedings, and reported the cases for determination by this court.

The cases were argued at the bar in January, 1908, before *Knowlton*, C. J., *Morton*, *Hammond*, *Loring*, & *Braley*, JJ., and afterwards were submitted on briefs to all the justices.

R. F. Herrick, for the plaintiffs.

L. R. Eastman, Jr., for the defendant.

LORING, J. It has always been a recognized principle of the English law, on the equity as well as on the common law side of the court, that a plaintiff is not bound to prosecute a suit or action to a finish because he has begun it. But on the contrary he is at liberty to abandon it without losing the right of action on which it is founded, and he can enforce that right subsequently on paying the costs of the former proceeding. In this respect a plaintiff is more fortunate than a defendant who has a day in court to interpose his defence if he would not have final judgment given against him.

What is not so clear is how far the plaintiff's proceeding (whether it be a suit in equity or an action on the common law side of the court) must have gone for it to have reached the stage where this right of abandonment is lost.

In England the plaintiff originally had a right to abandon an action at law and become nonsuit at any time before verdict, if not before judgment. *Derick* v. *Taylor*, 171 Mass. 444, 445. That it was before verdict and not before judgment is laid down in *Outhwaite* v. *Hudson*, 7 Exch. 380, 381; 2 Tidd's Practice,

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(3d Am. ed.) 867. This rule was adopted here by an ordinance of the Colony in 1641; Anc. Chart. 46; and in *Locke* v. *Wood*, 16 Mass. 317, it was contended by Webster and Shaw in 1820 that that was the rule of practice of the Commonwealth and that the plaintiff had a right to become nonsuit at any time before judgment. But the court "were of opinion that there was no such right; and that, after a cause is opened to the jury, and begun to be proceeded in before them, the parties are entitled to a verdict, unless the court should, in its discretion, allow a nonsuit or discontinuance." Since then it has been held or said to be the rule that a plaintiff can become nonsuit as of right at any time before the trial has begun but not afterwards. *Means* v. *Welles*, 12 Met. 356, 361. *Lowell* v. *Merrimack Manuf. Co.* 11 Gray, 382. *Shaw* v. *Boland*, 15 Gray, 571. *Truro* v. *Atkins*, 122 Mass. 418. *Burbank* v. *Woodward*, 124 Mass. 357. *Kempton* v. *Burgess*, 136 Mass. 192. *Derick* v. *Taylor*, 171 Mass. 444. *Worcester* v. *Lakeside Manuf. Co.* 174 Mass. 299. See also the previous case of *Haskell* v. *Whitney*, 12 Mass. 47.

The reason for denying in this Commonwealth the rule of the English common law was the injustice done to the defendant, who was subjected to being harassed a second time on one and the same cause of action on receiving costs, which in this Commonwealth are nominal. In that respect the burden of being subject to a second action is much greater here than in England, where costs are substantial. But the common law rule has now been abolished in England. By Order XXVI. of the Rules of the Supreme Court, 1883, adopted under the judicature act, it is provided that "the plaintiff may, at any time before receipt of the defendant's defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing" discontinue the action. Wilson's Practice of the Supreme Court of Judicature, (7th ed.) 234.

The Massachusetts rule as to when a plaintiff could become nonsuit in a common law action was established when substantially, if not absolutely, all such cases were tried to a jury. No question could arise as to what the rule was when applied to cases tried by the court, as so many cases are now tried since Sts. 1874, c. 248, § 1; 1875, c. 212, § 1; 1894, c. 357, now R. L.

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c. 173, § 56, directing all cases to be tried by the court unless a trial by jury is claimed by one of the parties. Until the case is opened the right to become nonsuit exists.

A question did arise as to the application of the rule in case of a preliminary trial before commissioners in case of a petition to recover compensation for property taken under the right of eminent domain. It was held that when the hearing before the commissioners was begun the right to become nonsuit was lost. *Worcester* v. *Lakeside Manuf. Co.* 174 Mass. 299.

The case at bar presents the question whether the right is lost when a hearing before an auditor has been finished but before the auditor's report is filed.

The cases relied on at the bar are not decisive of the point. It was held on the one hand in *Haskell* v. *Whitney*, 12 Mass. 47, that after an action has been sent to arbitrators under an agreement of submission voluntarily entered into, the plaintiff cannot become nonsuit even before a hearing before the arbitrators has begun. But that is a decision that when the action has by agreement of the parties been sent to arbitrators it ceases to be an action at law and becomes a submission to arbitration and a party to a submission has no right to become nonsuit. On the other hand it was held in *Stone* v. *Sargent*, 129 Mass. 503, that a case could be removed to a court of the United States, on the ground of prejudice, after an auditor's report had been filed. But the statute under which the removal in that case was allowed provided that the suit might be removed "before the final hearing or trial of such suit." See U. S. St. March 2, 1867, c. 196. As re-enacted in U. S. Rev. Sts. § 639, cl. 3, it provides that the case may be removed "before the trial or final hearing of the suit." It is settled that the trial referred to is the final trial. *Hess* v. *Reynolds*, 113 U. S. 73. *Baltimore & Ohio Railroad* v. *Bates*, 119 U. S. 464. This was the law in 1879, when the petition for removal in *Stone* v. *Sargent* was filed, and continued to be the rule until 1887, when U. S. St. March 3, 1887, c. 373, (24 U. S. Sts. at Large, 552,) corrected by U. S. St. August 13, 1888, c. 866, (25 U. S. Sts. at Large, 433,) was enacted, adopting, for removal for local prejudice, the rule as to removal by reason of diverse citizenship alone, to wit, "before any trial."

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Were the question now before us a question of first impression depending entirely on the advantages and disadvantages to the plaintiff and the defendant respectively, it is by no means clear that it ought not to be held to be too late for a plaintiff to become nonsuit when an order had been made sending the case to an auditor. A hearing before an auditor is not now, as it was, a preliminary investigation of complicated accounts and nothing more. The rule laid down in *Whitwell* v. *Willard*, 1 Met. 216, was altered by St. 1856, c. 202, now R. L. c. 165, § 55. Although this rule was altered so long ago, it was not until lately that the practice as to what cases should be sent to an auditor was changed. It has become the practice now, however, (owing to the overcrowding of the dockets,) to send to auditors cases involving a long investigation, no matter what the kind of investigation may be. The result is that an auditor's hearing is now a different thing from what it was. Not only that, but this change has been recognized by the Legislature. St. 1900, c. 418, (R. L. c. 165, § 59; c. 173, § 81,) provides that the court may set a day for the "trial" before the auditor, and upon such order being made the trial shall proceed from day to day until it is concluded; that the actual engagement of counsel in a hearing before an auditor shall be an excuse in another cause as if he were engaged in court, and each party is required to proceed before the auditor at the time appointed and "to produce in good faith, the testimony relied upon by him."

But in spite of the character which auditors' hearings have now assumed, it is still true that such hearings result in evidence merely and cannot result in an adjudication; and we are of opinion that a hearing which results in evidence and cannot *per se* result in an adjudication is not a trial within the rule which has now been laid down for over eighty years, namely, that a plaintiff can become nonsuit at any time before the trial begins and not afterward. Moreover this seems to have been assumed by the Legislature in this very statute, St. 1900, c. 418 (R. L. c. 165, § 59, and c. 173, § 81). It is there provided that if the plaintiff does not comply with the provisions of the act and attend before the auditor, or if he refuses in good faith to put in the testimony relied on by him, the court is authorized to direct

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him to become nonsuit. In making that provision it is assumed that the court has no power to enter judgment for the defendant at that stage of the proceeding.

Under these circumstances, we do not feel at liberty to dispose of the question on its merits. If, under the practice which now obtains, the rule, which we feel we are bound by, does injustice to defendants, the remedy is with the Legislature.

Entry of nonsuit to stand.

AUGUSTUS P. LORING, executor & trustee, *vs.* CAROLINE A. THOMPSON.

Suffolk. May 21, 1903. — September 1, 1903.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Devise and Legacy. Executor. Interest.

A testator gave two certain sums of money to trustees to pay the net income of each fund to a legatee for life with a remainder to others. He gave a third sum of money to a legatee absolutely. At the end of a year from the death of the testator the amount available for the legacies was in the hands of the executor but the estate was insufficient to pay the legacies in full. *Held*, that the legacies abated proportionally, but that the income upon the trust funds that would have been earned if they had been invested by a trustee during the year after the death of the testator was to be included in determining the proportions.

Where a sum of money is given by will in trust for the benefit of a person for life, the income to which the beneficiary is entitled under R. L. c. 141, § 24, from the death of the testator until the legacy is payable to the trustee, is to be determined by the actual income that the fund would earn if properly invested without regard to the rate of interest established by law.

BILL IN EQUITY, filed March 30, 1903, by the executor and trustee under the will of Mary S. B. Thompson, for instructions.

The case came on to be heard before *Braley*, J., who by agreement of parties reserved it upon the bill and answer for determination by the full court, such order to be made therein as justice and equity might require.

A. P. Loring, pro se.

J. Noble, Jr., for the defendant.

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KNOWLTON, C. J. The testatrix, by her will, gave $30,000 to trustees, to hold and invest and pay the net income thereof to Charlotte S. Averill for life, and the remainder to others, $15,000 upon the same terms to the same trustees for the benefit of Amy S. Perry for life, with remainder over, $5,000 absolutely to Caroline A. Thompson, and the residue to Charlotte S. Averill. The estate is insufficient to pay these legacies in full. If the estate had been sufficient, one life tenant would have been entitled to the income of the fund of $30,000 from the death of the testatrix, the other to the income of the fund of $15,000 from the same time, and the trustee would have had the principal of each of these funds to be held for future payments. *Sargent* v. *Sargent*, 103 Mass. 297, 299. *Westcott* v. *Nickerson*, 120 Mass. 410. *Kinmonth* v. *Brigham*, 5 Allen, 270, 278. *Ayer* v. *Ayer*, 128 Mass. 575. R. L. c. 141, § 24. Caroline A. Thompson also would have been entitled to $5,000 at the expiration of a year from the death of the testatrix. These are all general legacies, and because of the deficiency of assets they abate in equal proportions. *Bancroft* v. *Bancroft*, 104 Mass. 226. *Babbidge* v. *Vittum*, 156 Mass. 38. In considering these proportions we must take into account the fact that each of the funds held in trust is to be increased by the income that it would earn in one year, in order to ascertain the amount that would belong to it at the time when the $5,000 would be payable to Caroline A. Thompson. If the income on these funds were computed at the rate of four per cent per annum, and if the estate had been sufficient to pay these legacies in full, the first trust fund with its accrued income at the end of a year, would have been $31,200; the second trust fund with its accrued interest would have been $15,600, and the legacy to Caroline A. Thompson would have been $5,000, making the aggregate $51,800. At the end of a year from the death of the testatrix, when the estate was so far settled that the money could be paid over to the legatees, the amount available in the hands of the executor was $47,600. Estimating the income on this basis, the several legatees are entitled to share this sum in the following proportions, namely: the trustee is to have $\frac{31,200}{51,800}$ of it for the first fund; he is to have $\frac{15,600}{51,800}$ of it for the second fund, and Caroline A. Thompson is to have $\frac{5,000}{51,800}$ of it.

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An important question is whether the beneficiaries of the trust funds are to have income reckoned at the rate of six per cent per annum, or at a lower rate. It is a fact of common knowledge that not so large an income as this can ordinarily be obtained from safe investments. Formerly this question was not of much practical importance and was not often considered. Whenever interest is to be allowed for the failure to pay a legacy at the time when, by the terms of the will, it is payable, or for any other neglect to pay money, the law knows no other rate than six per cent per annum. *Welch* v. *Adams*, 152 Mass. 74. *Loring* v. *Massachusetts Horticultural Society*, 171 Mass. 401. *Bartlett, petitioner*, 163 Mass. 509, 521. Indeed, interest on a pecuniary legacy from the time when it becomes due, is allowed as incident to the principal demand, and is not imposed upon the executor for his neglect. *Kent* v. *Dunham*, 106 Mass. 586. So it was held in the case just cited that evidence to justify or excuse the executor in not paying the legacies at an earlier date was immaterial. A fundamental question in cases like the present is whether the income to which the beneficiary is entitled from the death of the testator is to be treated strictly as income, or is to be brought within the law which allows interest as an incident to the failure to pay a debt which is due. There is much in favor of the proposition that it is income actually received, or that would have been received if the money had been invested in the usual way. The statute implies this. R. L. c. 141, § 24. So do some of the decisions. *Lovering* v. *Minot*, 9 Cush. 151. *Pollock* v. *Learned*, 102 Mass. 49. *Ayer* v. *Ayer*, 128 Mass. 575. In *Edwards* v. *Edwards*, 183 Mass. 581, where the creation of a fund to include the whole residuum of the estate was necessarily postponed for a considerable time to enable the executors to convert the property into income-producing securities, it was held that for the purpose of apportionment of the fund between the life tenant and the remaindermen, the proportions should be ascertained upon the basis of the income that actually would have been obtained from the fund if it had been properly invested immediately after the death of the testator, rather than upon the basis of interest upon the fund at six per cent, before the property was converted. We are of opinion that it is better to hold in refer-

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ence to such funds, that the income to which the legatee is entitled from the death of the testator, is the income actually obtainable, and not interest at an arbitrary statutory rate. Of course, if the principal of the legacy is payable to a trustee, it is due at the end of a year from the death of the testator, if there is nothing in the will providing otherwise, and interest at the legal rate goes with it, as an incident, from that time. So on pecuniary legacies to a wife or minor child for whom no other means of support is provided, interest at the legal rate runs from the death of the testator. *Pollard* v. *Pollard*, 1 Allen, 490. *Welch* v. *Adams*, 152 Mass. 74, 78. But in a case of this kind the principal of the legacy cannot be paid at the death of the testator, and ordinarily a considerable time must elapse before an executor can be appointed and assets can be collected from which to make payment. During this time, until the principal becomes payable, the beneficiary is entitled to the income merely, which means the amount that the fund earns if it is properly invested; and if not, the amount that it would have earned if so invested. In *Bartlett, petitioner*, 163 Mass. 509, 521, the legatee was allowed income at the rate of six per cent per annum; but the question whether he should receive that or the income which might have been actually earned, was not discussed nor particularly considered, either by counsel or by the court. If it had been, we are of opinion that the result would have been different. *Loring* v. *Massachusetts Horticultural Society*, 171 Mass. 401, 404, although somewhat analogous, did not involve the precise question which we are now considering.

In the present case it does not appear that the assets from which the trustee will be paid were invested as income-producing funds, so that the actual income of either fund can be ascertained. We are therefore of opinion that the income which was received by the executor while he was administering the property, should be treated as a part of the general assets for division. The case will then stand for a hearing upon the question what income the trust funds would have produced during the year immediately following the death of the testatrix, if they had been invested by a trustee, and when that is determined, the proportions in which the whole balance should be divided will be ascertained upon the principles stated above. If income would have been

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earned at the rate of four per cent per annum, then the fractional shares of each will be those hereinbefore stated; if at a different rate, they will be varied accordingly.

So ordered.

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SELECTMEN OF WESTBOROUGH & another, petitioners.

Worcester. December 4, 1902. — September 2, 1903.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Grade Crossing. Damages. Limitations, Statute of.

Where the report of commissioners appointed under St. 1890, c. 428, on a petition to abolish certain grade crossings, requires a new location of a railroad passenger station at a point thirteen hundred feet from the old station, and the new station is constructed by the railroad company practically of the same size as the old one at a cost which an auditor finds to be fair and reasonable, the railroad company is entitled to be allowed the cost of the new station as part of the cost of the alterations and should not be restricted to the actual cost of reproducing the old station. In such a case the railroad company cannot be compelled to account for the value of land owned by it in fee on which the old station stands and which after the alterations is used by the railroad company for freight purposes.

In proceedings under St. 1890, c. 428, for the abolition of certain grade crossings in a town, the town is not entitled to be allowed as part of the cost of the alterations a sum paid in settlement of land damages which were barred by the limitation of the act, the town having no right to waive the statutory bar as against the railroad company and the Commonwealth, even if it might do so for itself.

In proceedings under St. 1890, c. 428, for the abolition of certain grade crossings in a town, the town is not entitled to be allowed as part of the cost of the alterations the amount of expenses incurred by it for counsel and expert witness fees in disputing the allowance of certain items in the account presented by the railroad company and disallowed by the auditor in that account.

MORTON, J. This is a petition under St. 1890, c. 428, by the selectmen of Westborough and the directors of the Boston and Albany Railroad Company for the separation and abolition of certain grade crossings in the town of Westborough. The case has been here once before on the validity of the decision of the special commission, and is reported in 169 Mass. 495. Since then the auditor has made a third report to which the town and the railroad company have both filed objections and exceptions. The case came up in the Superior Court for a hearing on the

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report, and upon the exceptions and objections to the report, and thereupon the presiding judge reported to and reserved for this court the questions arising upon the report and the evidence reported therewith and to exceptions and objections thereto. The special commissioner's decision and plan and the decree of the court thereon are made a part of the auditor's report.

The questions are whether the cost of the new passenger station erected by the railroad company upon the location to which the railroad was changed shall be included as a part of the cost of the alterations, whether the value of certain land belonging to and occupied by the railroad company prior to the alterations in connection with the former passenger station shall be credited to the general account, and whether certain sums paid by the town in settlement of a claim for land damage and for counsel and expert witness fees shall be included in the cost of the alterations.

1. As to the cost of the new station. The auditor finds that the total cost is $16,716.33, and that this is fair and reasonable. But, relying apparently upon the case of *Mayor & Aldermen of Newton, petitioners*, 172 Mass. 5, and adopting the contention of the town, he finds that the railroad company is entitled to "only the actual cost of reproducing the old station in substantially as good a condition as it was on its old location." Certain other items connected with and growing out of the construction of the new station, and about which there is now no controversy and which therefore need not now be considered, are also allowed. The report of the commissioners provided that the railroad location should be changed from a point about twenty-five hundred feet easterly of the old station to a point about five thousand feet westerly of it, and moved northerly so that at the point where the new station was constructed it was about thirteen hundred feet from the old station. The old station was on Main Street, and so, as we understand the situation, is the new. The old station is of brick and is of the same size practically as the new. In order to remove it to the new location it would have to be moved through the public streets about fourteen hundred feet. The report of the commissioners does not provide in terms at least for the construction of a new station as a part of the alterations. But it was said when the case was here before that

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"the position of the station would naturally and necessarily be changed, as an incident of the change of the location of the track." *Westborough, petitioner*, 169 Mass. 495, 498. Nothing is said in the commissioners' report about a removal of the old station, but we think that the reasonable construction of the report is that it contemplated the erection of a new station as a part of the alterations rendered necessary by the change in the location. The town does not, indeed, contend that a station is not to be provided as a part of and as incident to the alterations. But it relies upon the case of *Mayor & Aldermen of Newton, petitioners*, 172 Mass. 5, and contends that, according to the rules there laid down, the railroad is to be allowed only what it would cost to remove and fit up the old station, or to build a new one of similar size. But this case differs from the Newton case. In that case the new station was regarded rather as an improvement which the railroad company had availed itself, rightfully enough, of the changes required, to make, than as an alteration contemplated or required by the changes provided for. Moreover in that case the new station was upon the same site or substantially upon the same site as the old. In this case the decision of the commissioners required an entire relocation and removal of the tracks for a longitudinal distance of about a mile and a half, and the plan filed by them shows as a part of their report a new location of the station at a point eighteen hundred feet from and opposite to the old station. As already observed, we think that the report and plan of the commissioners contemplated the erection of a new station at the point thus designated, and not the removal of the old one to it. It appears that the new station is practically of the same size as the old, and there is nothing to show that the railroad company has availed itself of the opportunity afforded by the alterations required, to make extensive and expensive improvements which could not be fairly included as a part of the alterations, and the auditor expressly finds, as already observed, that the cost of the new station is fair and reasonable. We think that the ruling of the auditor limiting the railroad company to "the actual cost of reproducing the old station in substantially as good condition as it was on its old location" was wrong and that the company should have been allowed the cost of the new station. The fact that the

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railroad company gets a new station in the place of the old one, and that the new station is or may be better in other respects than the old one, is an incidental matter which cannot be taken into account in arriving at the actual cost of the alterations. *Mayor & Aldermen of Newton, petitioners, ubi supra.* The view of the matter which we have taken renders it unnecessary to consider whether the commissioners could have required the old station to be moved to the new location. We may add in passing that the objection that such a removal would have to be through the public streets does not impress us very strongly. It is to be presumed that the officers of the town would have granted a request for such removal if the removal had been required as a part of the general scheme for separating and abolishing the grade crossings in question.

2. The old station was partly within and partly without the old location, and stood on land belonging in fee to the company. Part of the land was conveyed to it subject to restrictions requiring the company to establish and maintain a depot or place of deposit on the premises, and restricting the erection of any building within fifty feet of the street. One deed also contained the restriction that no tavern or victualling house should be erected on the land conveyed. The auditor finds that this land, comprising about fifty thousand square feet, is not necessary for railroad purposes, and that the value of it, with or without the restrictions as the court finds that it is or is not now subject to them, should be credited to the general account in computing the cost of the station. The old location over the land has not been discontinued, and the land is still used by the company for freight purposes, and the old passenger station still stands there.

There is no doubt that in arriving at the total actual cost of alterations rendered necessary by the separation of grade crossings under the statute providing for such cases, the cost is to be arrived at by a proper system of credits as well as by a proper system of debits. *Mayor & Aldermen of Newton, petitioners*, 172 Mass. 5. The account is to be debited with whatever the party charged with making the alterations has furnished or expended in money, labor or materials, with whatever in short constitutes a part of the cost, and is to be credited with what is received or realized or ought to be received or realized from the alterations.

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Incidental benefits do not enter into the account. Neither does the question of betterments. The question in each case is one of cost; — the total actual cost of the alterations. Whatever on the one hand should be fairly reckoned as a part of the cost of the alterations should be debited to the account, and whatever on the other may fairly be reckoned as a proceed of the alterations should be credited to the account. If, for instance, a railroad company in changing its location as required for the separation of grade crossings should in constructing its road in its new location open therein in the process of such construction a valuable quarry and should sell the stone which it got out, or should open a valuable sand bank and should sell the sand, or should have on hand as the result of the alteration a quantity of old rails which it could sell or use, what was received from the stone or sand and the value of the old rails should be credited to the general account. But in the present case, the land, the value of which the town seeks to have credited to the general account was not a proceed of the alteration, and was not conveyed to the company, as a gift or otherwise, in consequence of it. The company had owned it for many years. It had the right, subject to the restrictions on which it held it, to use it for any purpose that it saw fit, and it is still using it for railroad purposes and for aught that appears will require it in its business. And we do not see how or on what ground it can be compelled to account for its value, restricted or unrestricted, because the passenger station has been moved somewhere else and the town and the Commonwealth are obliged to pay a part of the cost of the new station. We think therefore that the auditor was in error in crediting to the account the sum of $3,500 for the "value of the portion of the old location lying between the east side of Main Street and westerly line of the freight yard." The fact that, under some understanding or arrangement which is not before us, the company sold and conveyed to the town so much of its location as was on the westerly side of Main Street and that the proceeds were credited to the general account in a previous accounting has, of course, nothing to do with the question now before us.

3. The remaining questions relate to the sums paid by the town in settlement of a claim for land damages and for counsel

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and expert witness fees. The sums were disallowed by the auditor and we think that his ruling was right. The sum paid in settlement of land damages was paid after the claim had become barred by the statute. No suit or petition had been brought by the landowner, and so far as appears the town was under no legal liability to pay. Whatever the town could have done if it and the landowner had been the only parties interested, we do not think that it could waive the statutory bar as against the other parties to the accounting. The counsel and expert witness fees were incurred in disputing at a former hearing on an accounting the propriety, both in law and fact, of the allowance of certain items in the account presented by the railroad company, — being the same items disallowed by the auditor in the railroad company's account. We think that these expenses are to be regarded as incurred by the town in the preparation and trial of their side of a disputed controversy, rather than as constituting a part of the cost of the alterations or of the cost of the hearing before the commission. See *Providence & Worcester Railroad, petitioner*, 172 Mass. 117, 121.

The result is that the exceptions of the railroad company are sustained and those of the town are overruled.

So ordered.

A. P. Rugg, (*A. F. Brown* with him,) for the selectmen of Westborough.

S. Hoar, (*W. Hudson* with him,) for the Boston and Albany Railroad Company.

JOHN FINNIGAN & another *vs.* BRACKLEY SHAW.

Suffolk. December 9, 1902. — September 2, 1903.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Evidence, Extrinsic as affecting writings. *Agency.*

A seller of goods who accepts from a broker a sale note stating an absolute sale to a certain purchaser cannot show that the sale was conditional, if the broker had authority to make an absolute sale.

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MORTON, J. This is an action of tort to recover the value of four thousand one hundred and twenty-eight hides alleged to have been converted by the defendant to his use. The chief question in the case is whether the sale of the hides was a conditional one, in which the title was not to pass till certain notes had been paid by the purchasers, or whether it was an absolute sale. The hides were sold through brokers to the firm of L. B. Clark and Company, and were subsequently pledged by them to the Philadelphia Warehouse Company which assigned, for value and in good faith, its interest to the defendant. At the close of the evidence the judge ordered a verdict for the defendant and at the request of the parties reported the case to this court. If the ruling was right, judgment is to be entered for the defendant; otherwise such entry is to be made as justice may require. We think that the ruling was right, and that there was no evidence that would warrant a finding that the sale was a conditional one.

The plaintiffs are a New York firm dealing in hides. L. B. Clark and Company carried on a tannery at Kingman, Maine. As already observed, the sale was made through brokers. The brokers gave to each party a sale note stating the particulars and terms of the sale. The sale notes recited that Sands and Leckie, the brokers, had "Sold for account Messrs. John Finnigan & Co. to Messrs. L. B. Clark & Co.", at the prices and on the terms named in the sale notes, the hides therein described. The terms were "settlement by four months note of purchasers, buyers having privilege of extending time, if required, adding interest for such additional time at rate of 6 % p. a. To be shipped to L. B. C. & Co., Kingman, Me." The hides were shipped from New York by the plaintiffs as provided in the sale notes to L. B. Clark and Company at Kingman, Maine. Upon their receipt L. B. Clark and Company sent to the plaintiffs their notes for four months as provided in the terms of sale, and thereupon the plaintiffs sent to L. B. Clark and Company receipts marked paid and stating that L. B. Clark and Company had bought of John Finnigan and Company the hides described in them upon "Terms as per contract dated 2, 15, 98," which referred to the sale note of the brokers which was dated February 15, 1898. Neither the sale notes nor the receipts contained any-

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thing to show that the contract of sale was a conditional one. So far, it is clear, we think, that there is nothing in the transactions between the parties warranting a finding that the sale was not an absolute sale. L. B. Clark and Company afterwards failed and went into insolvency, and did not pay the notes when they fell due, but those facts cannot affect the character of the sale, and it is not contended that they do.

The plaintiffs seek to avoid the transaction as we have stated it by evidence, admitted in part at least *de bene*, which they contend tends to show that the brokers had no authority to make the sale except as a conditional one and that it was so understood and agreed to by L. B. Clark and Company. But we think that the testimony relied on does not support the plaintiffs' contention, and that, even if it did, it was inadmissible to vary the terms of the contract as expressed in the sale note accepted by the plaintiffs. The testimony tended to show that Sands and Leckie had previously acted for the plaintiffs as brokers in making sales to L. B. Clark and Company, and that in 1896 the plaintiffs wrote to Sands and Leckie requesting them to take tanning contracts for any hides that should thereafter be delivered to L. B. Clark and Company.

By tanning contracts were meant contracts under which L. B. Clark and Company should tan the hides, but the property should remain in the plaintiffs till the hides were paid for. The letter was read to L. B. Clark and Company and they assented to it. After this, as the uncontradicted testimony showed, in some of the sales to L. B. Clark and Company tanning contracts were taken, and in some they were not, and no objection appears to have been made at any time by the plaintiffs that Sands and Leckie had not authority to make the sale when the provision in regard to tanning contracts was omitted from the sale note. We do not see, therefore, how the jury would have been warranted in finding that the brokers had no authority to make an absolute sale, notwithstanding one of them testified that there had been no change since the receipt of the letter above as to the arrangements there proposed in regard to the sale of hides to L. B. Clark and Company, and that it was always understood by L. B. Clark and Company, though sometimes omitted from the contract, that the plaintiffs never made positive delivery of the

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goods till paid for. Moreover, one of the plaintiffs testified that Sands and Leckie had authority to make the contract of February 15, 1898, which was the contract of sale for the hides in question. The most that the conversation, at or about the time of the sale, with one of the members of the firm of L. B. Clark and Company, testified to by one of the brokers, amounts to, is an agreement, on the part of L. B. Clark and Company, to give a tanning contract if one was required, but none was required. If the brokers had authority to make the sale, then, inasmuch as the sale note contained the contract, and purported to set out an absolute sale, evidence tending to show that the sale was not an absolute one, but was a conditional one, was inadmissible as tending to vary or contradict the written contract. *Cabot* v. *Winsor*, 1 Allen, 546. *Remick* v. *Sandford*, 118 Mass. 102. *Engelhorn* v. *Reitlinger*, 122 N. Y. 76. The fact that the plaintiffs supposed, if they did suppose, that the sale was subject to the condition in regard to tanning contracts, is immaterial. They accepted the sale note as it was, and are bound by the contract contained in it.

In accordance with the report the entry will be

Judgment for the defendant.

A. A. Wyman, (*F. A. Wyman* with him,) for the plaintiffs.

G. W. Morse & C. R. Darling, for the defendant.

C. WILLIS GOULD & another, executors, *vs.* HENRY CHAMBERLAIN & others.

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Suffolk. December 10, 1902. — September 2, 1903.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Devise and Legacy. Evidence.

On the issue of the interpretation of a codicil to determine whether certain legacies given by it were in addition to or in substitution for legacies given to the same persons by the will, evidence is admissible that the testator knew before the date of the will that he was living on a steadily diminishing principal and that his expenses annually exceeded his income, that after the execution of the will and before the execution of the codicil, when told by his attending physician how long he might live, he replied that in such case he would make greater

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inroads upon his principal than he had expected to, and that twice before the execution of the codicil he consulted one or more of the persons named as his executors on the question whether his estate was sufficient to carry out the provisions of his will and said that he doubted whether it would be sufficient.

A testator knowing that his property was diminishing and being in doubt whether it would be sufficient to carry out the provisions of his will, made a codicil beginning: "My estate real and personal I bequeath as follows". Then came various cash legacies corresponding to legacies in the will to the same persons, the language following that of the corresponding clauses in the will. A person given in the will $5,000, payable out of the first moneys in the hands of the executors was given by the codicil $3,000 thus payable and "the further sum of $2,000 which shall first appear to be a residue thereof." Six persons given $1,000 each in the will were given $800 each by the codicil, and three persons given $500 each in the will were given the same amount by the codicil. Other cash legacies in the will were not referred to in the codicil. The general scheme of the will tended to show that the testator intended the cash legacies to be paid from certain personal property which might have been insufficient for the purpose if the legacies given by the codicil were cumulative. On a bill for instructions it was *held*, that the legacies given by the codicil were in substitution for those given to the same persons by the will.

BILL IN EQUITY, filed July 5, 1901, in the Probate Court for the County of Suffolk, by the executors under the will of Mellen Chamberlain, late of Chelsea, for instructions as to the construction and effect of a codicil to that will.

The testator died June 25, 1900, at the age of seventy-nine years. His wife had died on August 25, 1896. The will was dated March 26, 1900, and contained the following paragraphs:

"My estate real and personal, I give and bequeath as follows: To Mrs. John Whitman my faithful housekeeper, five thousand dollars to be paid to her out of the first moneys that shall come into the hands of my executors out of my estate, and without delay for the final settlement of my estate.

"To my brother in law, Hale E. Crosby, my brother Henry Chamberlain, both of Three Oaks, Michigan, and to my brother William Chamberlain, of said Michigan, I give each one thousand dollars ($1000).

"To Mrs. Mattie Fielding, daughter of my brother in law, John M. Putnam, to Miss Alice M. Putnam, niece of my late wife and to Mrs. Sarah W. Fuller, sister of my late wife, all of Danvers Mass. I give each the sum of one thousand dollars ($1000).

"To my name sake Mellen Chamberlain Hatch, son of Rev. George B. Hatch formerly of Chelsea, to Miss Mary A. Jenkins

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formerly of the Boston Public Library, to Miss Elisabeth Porter Gould of Boston and to Miss Mary F. Colesworthy of Chelsea, I give each the sum of five hundred dollars ($500)."

Then followed bequests to the city of Chelsea of twelve volumes of real estate titles, real estate plans and a photograph, to the Massachusetts Historical Society of the manuscript of the testator's uncompleted history of Chelsea, with plans and copyright, and $5,000 for revision and completion of the work, to Dartmouth College of his library of printed volumes and $500 for binding and repairs, and to the Trustees of the Boston Public Library of his collection of manuscripts, except that given to the Historical Society, also autographs, portraits and photographs and certain papers, books and pamphlets. Then after gifts of certain pictures and other personal effects, not material, the will, omitting the attesting clause, concluded as follows:

"All legacies in this my will lapse with the death of the legatee. All the rest, residue and remainder of my estate including lapsed legacies, I direct my Executors to sell and dispose of at private sale, or at public auction, as they may deem for the interest of the estate. When said residue and remainder are reduced to money I direct my executors to divide them into nine equal parts and pay to the following parties: To Mrs. John Whitman aforesaid one part; to Pembroke Academy Pembroke, N. H. two parts; to the Third Congregational Church, Chelsea, two parts; to the Massachusetts Historical Society, two parts; to Dartmouth College, N. H. one part; to Mary F. Colesworthy, Mrs. Henry A. Tenney, Miss Elizabeth Porter Gould and Paul Mellen Chamberlain all aforesaid, each one fourth part."

The codicil was dated May 31, 1900. After naming an executor in substitution for one of those named in the will, it proceeded as follows:

"My estate real and personal I bequeath as follows:

"To Mrs. John Whitman my faithful housekeeper, Three thousand dollars to be paid to her out of the first monies that shall come into the hands of my executors or to my estate and without delay for its final settlement and the further sum of two thousand dollars which shall first appear to be a residue thereof.

"To my brother in law, Hale E. Crosby, my brother Henry Chamberlain both of Three Oaks, Michigan, and my brother

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William Chamberlain of Jackson, said Michigan, eight hundred dollars each.

"To Mrs. Mattie Fielding, daughter of my brother in law, John M. Putnam, to Miss Alice M. Putnam niece of my late wife, and to Mrs. Sarah M. Fuller, sister of my late wife, all of Danvers, Massachusetts, the sum of eight hundred dollars each.

"To Miss Mary A. Jenkins formerly of the Boston Public Library, to Miss Elizabeth Porter Gould, of Boston, to Miss Mary F. Colesworthy of Chelsea, the sum of five hundred dollars each.

"To Miss Dora J. Murray, of Revere, the sum of one hundred dollars."

Here followed the attesting clause.

In the Probate Court *McKim*, J. made a decree to the effect that the testator never intended to revoke or change in any way the legacies in the will except those specifically mentioned in the codicil, and that the testator intended the legacies in the codicil to be substituted for the legacies given to the same legatees in the will. The heirs at law named as legatees appealed.

The case was heard by *Knowlton*, J. The heirs at law waived their contention made in the Probate Court that the codicil was a revocation of the will, and relied upon their further contention that the legacies to them, as well as the legacy to Mrs. Whitman, were cumulative.

It appeared that the testator's heirs at law were the defendants Henry and William Chamberlain, brothers of the testator, and his nephews, Henry C., Josiah B. and John A. Crosby. The defendant Mrs. John Whitman, at the time of the testator's death and for fifteen years preceding it, was his housekeeper and his friend. The defendants Mattie Fielding, Alice Putnam and Sarah W. Fuller were relations of the testator's wife. Mary A. Jenkins, Elizabeth Porter Gould and Mary Colesworthy were not relations of the testator. They were his friends, and were members of the local club to which he belonged. Dora J. Murray nursed the testator during his last illness. Mellen Chamberlain Hatch, mentioned in the will, was living at the date of the testator's decease.

At the time of the testator's decease his personal estate, including the manuscripts, was valued at $58,448, and his real

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estate at $19,625. The collection of manuscripts given to the Boston Public Library by the will of March 26, 1900, was valued at $28,500. Substantially all the remainder of the personal property was in savings bank deposits, bonds and securities.

Against the objection and subject to the exception of the heirs at law, the other defendants were allowed to introduce evidence upon which the justice found, that on and after August 1, 1898, the testator, as he well knew, was living on a steadily diminishing principal, and that his expenses annually exceeded his annual income at the rate of $800 a year; that, subsequent to the execution of the will and prior to the making of the codicil, the testator's attending physician told him that with good care he would live through the summer of 1900 and probably into the fall, and that the testator replied that in such case he would make greater inroads upon his principal than he had expected to.

Against the objection and subject to the exception of the heirs at law, the other defendants introduced evidence tending to show that on two different occasions after the execution of the testator's will and before the execution of the codicil, he consulted one or more of his proposed executors upon the question whether his estate was sufficient to carry out the provisions of the will, and, against the objection and subject to the exception of the heirs at law, introduced evidence on which the justice found, that, on these two different occasions, after the execution of his will and before the execution of the codicil, the testator said that he doubted whether his estate was sufficient to carry out the provisions of his will.

There was no evidence tending to show, more definitely than as above stated, the dates of these conversations. The objections and exceptions of the heirs at law were made in each instance solely on the ground that the evidence objected to was not competent on the question of the interpretation of the codicil.

The justice reported the case for determination by the full court, concluding his report as follows:

"I find and report that it was the intention of the testator that the legacies given by the codicil to each of the heirs at law, and to Mrs. Whitman, should be substitutional and not cumulative, and in so finding I am materially influenced by the afore-

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said evidence introduced under the objection and exception of the heirs at law.

"If there was error in admitting the evidence introduced, subject to the exception of the heirs at law, the order affirming the decree of the Probate Court that the legacies in question are not cumulative is to be reversed, and such disposition to be made of the cause by the full court as the law may require, unless the full court determines upon the will and codicil and evidence reported, so far as competent, that the decree of the Probate Court in this respect should be affirmed."

B. B. Jones, (*F. P. Cabot* with him,) for the heirs at law.

J. Abbott, (*S. Lincoln* with him,) for the Massachusetts Historical Society, the Trustees of the Boston Public Library and Dartmouth College.

MORTON, J. This is an appeal from a decree of the Probate Court for Suffolk County upon a petition for instructions by the executors of the will of Mellen Chamberlain. The single justice who heard the case affirmed the decree, and reported the case to this court for its determination. The questions are whether certain legacies given in the codicil are cumulative or substitutional in respect of legacies given in the will to the same persons, and whether certain evidence admitted subject to the exceptions of the heirs at law was rightly admitted. We take up the question of evidence first.

1. The evidence objected to was that the testator knew after August, 1898, which was before the date of the will, that he was living on a steadily diminishing principal, and that his expenses annually exceeded his income at the rate of $800 a year; that, subsequent to the execution of the will and prior to the execution of the codicil, he was told by his attending physician that with good care he would live through the summer of 1900 and probably into the fall, and that he replied that in such case he would make greater inroads upon his principal than he had expected to; and that twice after the execution of the will and before the execution of the codicil he consulted one or more of the persons named as his executors on the question whether his estate was sufficient to carry out the provisions of the will, and said on these occasions that he doubted whether his estate was sufficient to carry out the provisions of his will.

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It is well settled that the situation and circumstances of a testator may be shown in order to enable the court to put itself as near as may be in his place and ascertain what he intended to express by the language used. *Crocker* v. *Crocker*, 11 Pick. 252, 256. *Popkin* v. *Sargent*, 10 Cush. 327, 330. *Morse* v. *Stearns*, 131 Mass. 389. *Boys* v. *Williams*, 2 Russ. & Myl. 689. *Martin* v. *Drinkwater*, 2 Beav. 215. If every word had only one meaning, and was incapable of being used or understood in any other sense, there would be no occasion for the introduction of such testimony. But language is far from having such certainty, and hence the necessity that in order to correctly interpret it the court should understand the circumstances under which and in reference to which it was used. A testator's declarations of his intentions are inadmissible, though logically they would seem to be the best evidence obtainable. They are excluded, however, by reason of the statute, which requires wills to be in writing, and also of the rule that forbids the introduction of parol evidence to alter or vary written instruments. In the present case the evidence that was admitted was not evidence of statements by the testator of his intentions, but was evidence tending to show a knowledge and appreciation on his part of his situation and circumstances and as such was clearly admissible.

2. The question whether the legacies in the codicil are to be regarded as cumulative or substitutional is one of intention. In *Wainwright* v. *Tuckerman*, 120 Mass. 232, 238, it is said that, "When legacies are given by different instruments, the general rule is that the second is to be treated as additional to the first, in the absence of anything signifying a different intention; but in this, as in all other questions of construction of testamentary instruments, the apparent intention of the testator must be the guide of the court." See also *Bates, petitioner*, 159 Mass. 252, 257. Taking into account the evidence of the statements of the testator and his knowledge of his circumstances it seems to us clear that the legacies in the codicil, so far as given to the same persons to whom legacies are given in the will, are to be regarded as substitutional, rather than as cumulative. It is not reasonable to suppose that he could have intended those legacies to be in addition to the legacies already given when he had in effect expressed his doubts whether the estate was sufficient to pay the

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legacies already given. The more natural interpretation of the codicil is that the testator intended it as the last and final expression of his purposes in regard to the persons named in it, and as taking the place as far as it went of the will. The codicil itself, it seems to us, bears out this construction. Although it begins by saying that it is a codicil to his last will and testament, and that is the general character of the instrument, it purports also to be a disposition of the whole estate, real and personal, of the testator, as is shown by the phrase, "my estate real and personal I bequeath as follows:", which is copied from the will. The reasonable explanation of this language is that the testator intended by it to signify that the legacies which follow were to be all that the several parties named were to receive out of his whole estate. Again, the language of the codicil is copied from corresponding clauses in the will, — and this has been held to indicate an intention to substitute in such cases the second legacy for the first. *Suisse* v. *Lowther*, 2 Hare, 424, 432. Moreover the words "out of the first monies that shall come to the hands of my executors" in the will and codicil, and the words "which shall first appear to be a residue thereof" in the codicil, which words are used in each instance in regard to the legacy to Mrs. Whitman, and the general scheme of the will tend to show, we think, that it was the intention of the testator that the savings bank deposits, bonds and other securities should constitute the fund from which the cash legacies should be paid. This intention would or might be defeated in part at least if the legacies given in the codicil are regarded as cumulative.

It is no doubt true, as the heirs at law contend, that a codicil revokes and changes a will only so far as the intention to do so is manifest. But as already observed, we think, that it was the intention of the testator to substitute the legacies given in the codicil for those given to the same persons in the will, and that this is manifest from the will and codicil and the evidence that was admitted. Very likely if it had occurred to the testator he would have said in so many words that the legacies given in the codicil were in substitution of those given in the will. But the fact that he did not do so, and that some of the cash legacies given in the will, including one to his namesake, are not referred to in the codicil does not necessarily show that the legacies in

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the codicil must be regarded as cumulative in respect to those persons who are named in the will. If the case of *Wilson* v. *O'Leary*, L. R. 7 Ch. 448, relied on by the heirs at law, is to be regarded as laying down the rule as "a positive rule of law of construction," that "gifts by two testamentary instruments to the same individual are to be construed cumulatively," (p. 454) then all that need now be said of it is that that is not the law here. But even in England there are cases which hold, as we do, that the question is one of intention, (*Gillespie* v. *Alexander*, 2 S. & S. 145, *Martin* v. *Drinkwater*, 2 Beav. 215, *Fraser* v. *Byng*, 1 Russ. & Myl. 90,) and that where it appears that the second legacy was intended as a substitute for the first it will be so construed. Cases *supra*.

The result is that we think that the decree of the Probate Court should be affirmed.

So ordered.

CHARLES DUNCAN *vs.* JAMES H. JACOBS.

Suffolk. January 13, 1903. — September 2, 1903.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Contract, Construction.

By a contract in writing the plaintiff agreed to excavate certain material, preparatory to the erection by the defendant of a building for the city of Boston. The contract provided that the plaintiff should "excavate all material, load and cart same to Columbia Road" at a designated place, the price for excavated material except loam to be sixty-two and one half cents per cubic yard, the loam to be placed on lot as directed by the defendant and to remain the property of the defendant, and the price for loam so placed to be twenty-five cents per cubic yard. Certain of the material not loam was excavated by the plaintiff but was not loaded or carted to Columbia Road. *Held*, that for this portion of the material excavated the plaintiff could recover only a reasonable price, which was found to be twenty-seven and one half cents per cubic yard, as the price of sixty-two and one half cents per cubic yard fixed by the contract included the loading and carting to Columbia Road as well as excavating.

MORTON, J. This is an action of contract to recover a balance alleged to be due to the plaintiff under a written agreement between him and the defendant for excavating certain material preparatory to the erection of a high school building by him

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for the city of Boston. The plaintiff has been paid according to the contract for all the material excavated except two thousand four hundred and forty-three cubic yards, and for that he has been paid at the rate of twenty-seven and a half cents per cubic yard. The question is whether he is entitled, as he contends, to sixty-two and a half cents per cubic yard which is the price named in the contract "for excavated material except loam," or to twenty-seven and a half cents per cubic yard, as the defendant contends, which the jury have found to be a fair and reasonable price for excavating the material, and which as already observed the defendant has paid. The case is here on exceptions by the plaintiff to the ruling of the judge directing the jury to find for the defendant. If the judge erred in directing the jury to return a verdict for the defendant then the plaintiff is to have judgment for $855.05 with interest from the date of the writ.

The question is a narrow one and the answer to it depends on the construction to be given to the contract. So much of the contract as is material is as follows: "Excavate all material, load and cart same to Columbia Road, between Mercer Street, South Boston, and Mt. Vernon Street, South Boston, and there deposit same subject to and under the conditions of a contract between the city of Boston, Mass. and said Jacobs & Son, dated October 20, 1898, to which reference is hereby made. . . . Price for excavated material except loam to be sixty-two and one half cents per cubic yard. . . . The loam to be placed on lot as directed by said Jacobs & Son and to remain the property of said Jacobs & Son. Price for loam so placed to be twenty-five cents per cubic yard."

It is to be observed that the plaintiff was to excavate all material and load and cart it to Columbia Road. The material in question was excavated, but was not loaded and carted to Columbia Road. It was left on the premises and was used for back filling. There was testimony tending to show that the plaintiff knew when he made his contract that it was not to be carted to Columbia Road and that if it had been the defendant would have had to cart other material to be used for that purpose. The plaintiff contends that "price for excavated material" means the same as "price for excavating material," and is

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limited to that and to that alone. If this contention is correct, then, notwithstanding, the contract requires the plaintiff to excavate all material and load and cart it to Columbia Road, it omits to fix any price for the loading and carting, or for material excavated and loaded and carted to Columbia Road. On the other hand if, as the defendant contends, the words "price for excavated material" mean the same as price "for material excavated and loaded and carted to Columbia Road" then the contract omits to provide a price for the case that has arisen, namely, for material, not loam, excavated but not loaded and carted to Columbia Road. There are objections to and arguments in favor of each construction. But it seems to us on the whole that the construction for which the defendant contends is the more reasonable. Two things are contemplated by that part of the contract which we are considering: first, that all the material except the loam shall be excavated and loaded and carted to Columbia Road; secondly, that the loam shall be excavated and left on the premises where the defendant directs. It would seem natural that the prices that are fixed should relate to those two things, and that therefore the words "price for excavated material except loam," etc. is simply a compendious way of saying "price for excavated material except loam loaded and carted to Columbia Road." This construction is fortified by the difference in price which would otherwise exist between excavating the loam and placing it where directed on the premises, and the price which would otherwise be established for excavating the other material. The only reasonable way of accounting for that difference, it seems to us, is that the price was intended to include and does include loading and carting it to Columbia Road as well as excavating it.

The answers of the jury to the questions that were put to them do not, it seems to us, throw any light on the construction to be given to the contract; neither, it seems to us, does that part of the contract between the defendant and the city of Boston which is printed in the exceptions.

The result is that the exceptions must be overruled.

So ordered.

A. D. Moran, for the plaintiff.

J. A. Dennison, for the defendant.

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MARGARET I. McDERMOTT *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 3, 1903. — September 2, 1903.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND, LORING, & BRALEY, JJ.

Negligence.

A child six and one half years old, passing over a cross walk from one side of a street to the other on her way to school, and following other children across an electric car track without looking to see whether a car is coming or listening for the ringing of a gong, is not as matter of law necessarily negligent, and, in an action by her against the railway company for injuries from being struck by the car, the question of her due care is for the jury.

TORT by an infant by her next friend for injuries from being struck and knocked down by a car of the defendant. Writ dated December 18, 1899.

At the trial in the Superior Court *Bishop*, J. at the close of the plaintiff's evidence ordered a verdict for the defendant, on the ground that the evidence did not disclose that the plaintiff was in the exercise of due care. The plaintiff alleged exceptions.

The case was argued at the bar in March, 1903, before *Knowlton*, C. J., *Lathrop*, *Barker*, *Hammond*, & *Braley*, JJ., and afterwards was submitted on briefs to all the justices.

F. P. Curran, for the plaintiff.

E. P. Saltonstall, (*W. Flaherty* with him,) for the defendant.

BRALEY, J. At the time of the accident, the plaintiff, a child six and a half years of age, was on the cross walk at the intersection of Highland Avenue with Cherry Street in the city of Somerville, and as she was passing over the track of the defendant, one of its cars struck her. The defendant offered no evidence at the trial, but at the close of the plaintiff's case asked the judge to rule that she was not in the exercise of due care and could not recover. The judge so ruled, and the case is here on her exception to the ruling.

The plaintiff did not testify, but from the evidence set out in the exceptions it appears that she was on her way to school with

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other children. The schoolhouse, known as the Burns School, was on Cherry Street, which ran westerly from the westerly side of Highland Avenue, and to reach it the plaintiff and other children from the same section of the city attending that school would be obliged to pass over Highland Avenue at the cross walk that ran from the east side of the avenue to Cherry Street. While walking with the other children, some of whom preceded her, as she came up to the cross walk through which ran the track of the defendant, and when within six or seven feet of the rail, the car that struck her was about one hundred and forty feet distant, and in full view from the crossing. At that time the conductor in charge of the car, which was running at "a pretty good rate of speed," first saw her, and while it would be obvious to any one in the motorman's place that children were in the street and passing over the crossing, the gong was not sounded until the car was within ten or fifteen feet of the plaintiff, who does not appear to have either seen it coming or heard the gong. The children in front of her kept on walking over the track; she followed, and as she stepped on the rail the accident happened.

It cannot be held as matter of law that for a child six and one half years of age to pass over a cross walk that leads from one side of a street to the other, while on her way to school, and through which runs the track of a street railway, is of itself negligence. The question is narrowed to the inquiry, ought the plaintiff, when she could have seen the car, to have looked to see if one was coming, and also to have listened for the sound of the gong before attempting to cross the street, and whether, having failed to do so, she must therefore be held to have been guilty of such contributory negligence as bars her recovery.

In the cases that from time to time have been before this court in which the due care of children of tender years, while travellers upon the public ways, has been discussed, it has been said that the child "is to be held to the exercise of that degree of care which may reasonably be expected of children of his age, or which children of his age ordinarily exercise." *Collins* v. *South Boston Railroad*, 142 Mass. 301, 314, and cases cited. The principle is clearly defined, but the difficulty arises in its application to the facts of different cases, and it often becomes a

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matter of great perplexity and doubt to determine if the child is of such tender years that the rule cannot be held to govern, and the doctrine of imputed negligence as applied to the conduct of parents or those intrusted with his care must be invoked. A child may be so young in years that if allowed by his parents, or those having custody of his person, to go unattended on the highways, such conduct on their part would unhesitatingly be condemned by the average judgment of men as careless, and to be imputed to the child if he should thereby be injured. It was accordingly held that to allow a child two and one half years old unattended to pass across a public street in a city, and which was traversed by a horse railroad, was *prima facie* evidence of want of due care of those having him in charge. *Wright* v. *Malden & Melrose Street Railroad*, 4 Allen, 283, 289. See *Butler* v. *New York, New Haven, & Hartford Railroad*, 177 Mass. 191; also *Cotter* v. *Lynn & Boston Railroad*, 180 Mass. 145.

But in *Lynch* v. *Smith*, 104 Mass. 52, and in *Hayes* v. *Norcross*, 162 Mass. 546, the plaintiffs being respectively four years and seven months and five years and six months of age, on the facts disclosed it was said that the issues involved were, did the plaintiff possess such a degree of intelligence and knowledge that he could properly be allowed to go alone through the street, and if it was found that he did, then did he use such care as an ordinarily prudent and careful boy of his age is accustomed to use under like circumstances. "School children who are properly sent to school unattended must use such reasonable care as school children can. It must be reasonable care adapted to the circumstances, or, in other words, the ordinary care of school children." The case at bar falls within the law of these cases, and whether a child of the age of the plaintiff is sufficiently intelligent to be allowed to attend the public schools in the ordinary way unaccompanied, as well as the degree of foresight required of, and used by the plaintiff under the circumstances, as shown by the evidence, are to be determined as questions of fact. *Lynch* v. *Smith*, *ubi supra*. *O'Brien* v. *Hudner*, 182 Mass. 381.

The evident willingness to take chances and the accompanying spirit of recklessness on the part of the plaintiff that appears in cases like *Messenger* v. *Dennie*, 137 Mass. 197, *Mullen* v. *Spring-*

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field Street Railway, 164 Mass. 450, *Morey* v. *Gloucester Street Railway*, 171 Mass. 164, and *Sewell* v. *New York, New Haven, & Hartford Railroad*, 171 Mass. 302, are wanting in this case.

The relative rights of the parties in the use of the street are clear. The plaintiff had a right to the use of the street as a traveller for the purpose of going to school, equal to that of the defendant to run its cars therein as a common carrier of passengers. It is difficult to distinguish in principle this case from *O'Shaughnessy* v. *Suffolk Brewing Co.* 145 Mass. 569. In that case a girl eight years and one month old, while on her way to school, sat down on the edgestone of the sidewalk for the purpose of sharpening a slate pencil. She knew that there was much driving on the street and did not at any time look to see if a wagon was coming. As she sat with one leg under her and the other leg projecting into the street, she was struck by a wagon belonging to the defendant and run over, and the question if at the time she was in the exercise of due care was held to have been properly submitted to a jury. Here the plaintiff was properly on the cross walk, where foot travellers crossing Highland Avenue at that point would be, and had a right to rely on the presumption that the servants of the defendant, knowing the use of the walk by children going to the Burns School, would pay that regard to those lawfully in the street at that place which reasonable care and diligence required. It might be found that it would be childlike and natural for her to follow her companions and to pay no close attention to surrounding conditions. For these reasons it cannot be said as matter of law that the plaintiff's failure either to look and ascertain if a car was coming, or to listen for the ringing of the gong, or to fully appreciate the possibility that cars passing the crossing would run at such speed that she might be struck before she passed over the track was contributory negligence. *Plumley* v. *Birge*, 124 Mass. 57. *Moynihan* v. *Whidden*, 143 Mass. 287, 292. *McNeil* v. *Boston Ice Co.* 173 Mass. 570. *Aiken* v. *Holyoke Street Railway*, 180 Mass. 8.

Upon the evidence a jury could find that the plaintiff was in the exercise of such care as might be expected of the ordinarily prudent child of her age, and there must be a new trial.

Exceptions sustained.

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PLUNGER ELEVATOR COMPANY *vs.* JOHN E. DAY.

Worcester. March 11, 1903. — September 2, 1903.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Practice, Civil. Evidence. Contract.

In an action of contract the plaintiff put in evidence an auditor's report and rested. Thereupon the defendant asked the judge to rule that certain findings of the auditor were rulings of law and should be disregarded by the jury. The judge refused to make the ruling at that time on the ground that the auditor's report made out a case for the plaintiff without the findings in question. The defendant then introduced his evidence, and when the case was submitted to the jury did not renew his request. *Held*, that the request was refused properly at the time it was made, and that when the case was submitted to the jury the judge was not bound to act upon the previous request.

In an action for the construction and installation of an elevator in a building, which after the installation had been totally destroyed by fire, it appeared that the defendant before the fire, although he had used the elevator, had refused to pay for it because it did not conform to the contract in every detail, and after the fire contended that the title to the elevator had not passed to him. The defendant was asked by his counsel whether the elevator was ever approved by him. The question was excluded. *Held*, that the exclusion was right, as the question depended upon inferences to be drawn from the facts in evidence and called for the defendant's conclusion on the issue to be submitted to the jury.

In an action to recover for constructing and installing an elevator in a building of the defendant, if it appears that there was a contract in writing for the construction and installation of the elevator between the defendant and a person other than the plaintiff, and there is no evidence of an assignment to the plaintiff, the plaintiff may recover on showing that with the assent of all concerned the plaintiff and defendant made an oral agreement on the terms set forth in the written contract before any work was done under it.

CONTRACT for $2,406.45 for an elevator, including a car and working appliances, installed by the plaintiff in a building of the defendant at his request. Writ dated September 30, 1897.

At the trial in the Superior Court before *Gaskill*, J., the jury returned a verdict for the plaintiff in the sum of $2,365.50. The defendant alleged exceptions.

H. Parker & F. L. Dean, for the defendant.

E. H. Vaughan, for the plaintiff.

LORING, J. In this case the defendant accepted in writing a proposition for the construction and installation of an elevator in a building owned by him. The proposition which was ac-

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cepted was in writing and purported to have been made by the "Washburn Shops." Work on the elevator stopped on or about November 1, 1896, and thereupon the defendant put a man in charge of it "who operated it for the uses of the building in which it was constructed until March 4, 1897," when the building in question was totally destroyed by fire. Before the fire the defendant had refused to pay for the elevator because it did not conform to the contract in every detail, and after the fire the defendant took the position that the title to the elevator had not passed to him and the loss from its destruction was not his.

The case was sent to an auditor, who found that the Washburn Shops was a branch of or annex to the Worcester Polytechnic Institute, that it had no legal existence and therefore no power to make contracts, and that the plaintiff corporation assumed and accepted as its own the written agreement for the elevator before any work was done under it; "that the defendant knew, or had reasonable cause to know, that the plaintiff corporation was placing said elevator upon his premises; that said plaintiff corporation was acting under and attempting to carry out the terms of said written agreement and assented to the same." The auditor also found that the elevator became a part of the realty.

The plaintiff had a verdict, and the case is here on exceptions taken by the defendant.

1. The plaintiff put the auditor's report in evidence and rested. The defendant then asked the judge to rule that the auditor's findings that the elevator became part of the realty and that the Washburn Shops had no power to make contracts were rulings of law and should be disregarded by the jury. The presiding judge replied: "At present I shall decline to accede to your suggestion with reference to it. I think there is enough independent of those two findings of law to sustain the burden." To this the "counsel for the defendant replied to the court, 'We raise this question now that there may be no question of being seasonably raised, and beg we might be saved our exception.' At no subsequent time was this matter further called to the attention of the court."

The ruling of the presiding judge was right. The auditor's report made out a case for the plaintiff aside from the two find-

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ings complained of as rulings of law. The time had not come when the defendant had a right to have the jury instructed as to the way in which the auditor's report should be dealt with by them, and no exception lies to the refusal of the judge to give the instruction requested. Later the defendant introduced his evidence. The requests were not renewed when the case was submitted to the jury, and the judge was not bound to act at that time upon the previous requests.

2. The defendant's counsel asked the defendant: "Was the elevator in question ever approved by you?" The presiding judge excluded the question. The question was one depending upon inferences to be drawn from the facts in evidence. In such a case it is for the jury to find from the facts proved whether the elevator was or was not approved by him. The question asked called for the defendant's conclusion on the issue which it was the province of the jury to decide, and was properly excluded. *Brewer* v. *Housatonic Railroad*, 107 Mass. 277. *Commonwealth* v. *Burton*, 183 Mass. 461. *Robbins* v. *Atkins*, 168 Mass. 45. *O'Donnell* v. *Pollock*, 170 Mass. 441.

3. The defendant asked to have the jury instructed that the plaintiff could not maintain its action. The ground on which he now contends that the ruling should have been given is that the contract was made with the Washburn Shops and that in the absence of an assignment of it by the Washburn Shops to the plaintiff the plaintiff cannot recover for the elevator built under it. But the answer to this argument is that the plaintiff's contention at the trial, or one of its contentions, was that the plaintiff and defendant made an oral agreement on the terms set forth in the written contract between the Washburn Shops and the defendant which was substituted for that written contract with the assent of all concerned, before any work was done under it, and the auditor must be taken to have found that the defendant assented to this substitution. How the defendant could be found to have assented if he had reason to know but did not know of the substitution, it is hard to see. But no question on that point was raised by the defendant. Moreover there may have been further evidence on the point. There is no statement in this bill of exceptions that all the evidence is set forth. No error is shown in not giving the ruling.

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4. The defendant asked to have the jury told that the elevator had not become the property of the defendant before its destruction. This request was asked for in connection with a clause in the contract providing that until paid for the Washburn Shops could remove the elevator, and the defendant's contention that until then by reason of this clause neither the elevator nor the loss was his. But in the first place the auditor found as a fact that the defendant accepted the elevator as it was before the fire, and in the second place there was evidence at the trial that the defendant had agreed to waive his objection founded on a failure to comply with some details of the specifications if the plaintiff would make some repairs on another elevator, which, on the evidence, the jury were warranted in finding was done. Under those circumstances the ruling was rightly refused.

The other exceptions have not been argued and we treat them as waived.

Exceptions overruled.

HORACE G. ATWOOD *vs.* THOMAS B. BAILEY.

Suffolk. March 16, 1903. — September 2, 1903.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Bankruptcy.

Under the bankruptcy act of 1898 an adjudication in bankruptcy and the appointment of a trustee vest the title to the bankrupt's property in the trustee, and are a defence to an action of contract by the bankrupt pending at the time of the adjudication, unless it appears affirmatively that the action is being prosecuted by the trustee, or that the trustee has elected not to assume it. In order to prove an election by acquiescence, it is necessary to show the trustee's knowledge of the action, and such knowledge cannot be inferred from the fact that the action was pending in a court of general jurisdiction.

CONTRACT, by a claim adjuster, for an agreed compensation for services, of ten per cent on all moneys received by the defendant in a certain suit against an accident insurance company above the sum of $2,000, the suit having been settled for $4,750. Writ dated February 18, 1900.

At the trial in the Superior Court before *Maynard*, J., the

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plaintiff testified that he went into bankruptcy on July 17, 1901.

At the close of the evidence the judge ruled that upon the evidence as to the bankruptcy proceedings the action could not be maintained, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

J. M. Browne, for the plaintiff.

F. R. Mullin, (*G. R. Swasey* with him,) for the defendant.

LORING, J. In this case the plaintiff was held not to be entitled to maintain his action because he was duly adjudicated a bankrupt after the action was begun. The present bankruptcy act under which the plaintiff was adjudicated a bankrupt vests the title to the bankrupt's property in the trustee without an assignment in fact. U. S. St. 1898, c. 541, § 70. 30 U. S. Sts. at Large, 563.

It is settled that an assignment in bankruptcy is a defence to a prior action brought by the bankrupt unless it affirmatively appears that either the prior action in the name of the bankrupt is being prosecuted by the assignee or that the assignee has elected not to assume the burden of it. See *Smith* v. *Chandler*, 3 Gray, 392; *Gay* v. *Kingsley*, 11 Allen, 345; *Mayhew* v. *Pentecost*, 129 Mass. 332; *Herring* v. *Downing*, 146 Mass. 10; *Kenyon* v. *Wrisley*, 147 Mass. 476; or that the property is not needed for the payment of the debts of the bankrupt, as in *Jones* v. *Dexter*, 125 Mass. 469.

The plaintiff's contention here is that the jury would have been warranted in finding that the trustee elected not to assume the chose in action now before us and that he was entitled to go to them on that issue. There was no direct evidence of an election by the trustee. The plaintiff undertakes to make out an election by showing knowledge on the part of the trustee, followed by inaction. But in our opinion there was no such knowledge shown on the part of the trustee as would warrant a finding that his inaction was an election not to assume this chose in action.

The bankrupt did not insert the claim against the defendant in his schedule, and there was no evidence that the trustee in bankruptcy has ever had actual knowledge of it. All the evidence of knowledge on the part of the trustee was this: On

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being asked on cross-examination whether he had stated that he had any claim against the defendant, the plaintiff said "not in my schedule, but to the referee," and after testifying that the claim in question was covered by a general item "Claims against various parties," said, "I put it in," and on being asked where, "To the trustee, and it was appraised there too." The "claims against various parties" were put down as "aggregating about $2000," and "probably worth $100." On the plaintiff's testimony his claim against the defendant was for $275 and interest.

This is not enough to make out an election by inaction. To make out an election in that way actual knowledge on the part of the person who had the right to elect must be shown. In *Gay* v. *Kingsley*, 11 Allen, 345, it was held that an election by an assignee's not taking action was not made out by its being shown that he had taken the schedule of the bankrupt from the files without its being shown that the claim in question was on the schedule. In *Mayhew* v. *Pentecost*, 129 Mass. 332, actual consent on the part of the assignee was proved, and in *Herring* v. *Downing*, 146 Mass. 10, the assignee was in court when the case was tried, and made no objection.

The plaintiff relies on the case of *Lancey* v. *Foss*, 88 Maine, 215. That case, like this, was the case of an action pending when the assignment in bankruptcy took effect. It came up on an agreed statement of facts from which it appeared that no action had been taken by the assignee for fourteen years. The judge held that knowledge on the part of the assignee might be inferred from the fact that the action was a matter of public record, being upon the docket and files of a court of general jurisdiction, and directed the case to stand for trial, adding, "If, however, the defendants desire, they can have an order of notice of this action served upon the assignee which will conclude him of record." There is nothing in the cases cited in *Lancey* v. *Foss* which supports the proposition that knowledge in this connection may be inferred from the fact that the action is pending in a court of general jurisdiction, and so far as that case goes on that ground we are not prepared to follow it.

Exceptions overruled.

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187	484
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JOSEPH T. BROWN, trustee, *vs.* LEWIS G. FARMER, executor, & others.

Suffolk. March 16, 1903. — September 2, 1903.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Devise and Legacy, Construction. *Words*, "Their natural life", "Their decease."

A will gave a fund to trustees to pay the income to the testator's three children named "equally, annually, or semi annually, as they may prefer during the term of their natural life and to divide after their decease the rest and residue of the trust premises aforesaid under their charge equally among my children then living, and the issue of any deceased child or children giving to the issue of any deceased child the share to which the parent if living would have been entitled." *Held*, that each of the testator's three children was entitled to the income of an undivided third of the trust fund during his or her life, and that on the death of each there was to be a distribution of one third of the principal among the children of the testator then living and the issue of deceased children *per stirpes*, including the issue of the beneficiary for life of the third of the fund being distributed.

BILL IN EQUITY, filed February 26, 1903, by the trustee under the seventh clause of the will of William Brown, late of Boston, for instructions.

The case came on to be heard before *Morton*, J., who reserved it upon the bill and answers for the consideration of the full court, such disposition to be made thereof as to the court should seem meet.

C. Hunneman, for the trustee.

R. A. Jackson, for Henry Howard Brown.

Roland Gray, for Rachel M. Sedgwick and others.

J. K. Berry, for Thomas Earle White and another.

H. H. Darling, guardian *ad litem* for Thomas Earle White, Jr.

LORING, J. William Brown died leaving a wife and two daughters, Mrs. Parker and Mrs. Griffith, and a son, Henry Howard Brown. After giving a pecuniary legacy to each child, he gave the residue of his estate to his wife for life, and on her death, by the seventh clause now in question, he bequeathed $180,000 in trust and the residue equally among his three children. His estate amounted to about $400,000.

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The trust created by the seventh clause is as follows: "Seventh. At the decease of my wife I give and bequeath to Joseph T. Brown of Boston and Henry A. Church of West Roxbury and to the survivor of them his heirs and assigns forever as joint tenants and not as tenants in common, in trust nevertheless for the uses and purposes herein specified to wit: — The sum of one hundred and eighty thousand dollars to hold and to take charge of the same to collect the rents incomes interest and profits thereof and after deducting all reasonable and proper charges and expenses, to pay over the said rents incomes interest and profits to my children Lucy Josephine Parker — Olivia Howard Griffith and Henry Howard Brown equally, annually, or semi annually, as they may prefer during the term of their natural life and to divide after their decease the rest and residue of the trust premises aforesaid under their charge equally among my children then living, and the issue of any deceased child or children giving to the issue of any deceased child the share to which the parent if living would have been entitled."

The widow of the testator has since died, the trust provided for by the seventh clause was duly created, and the plaintiff is now the trustee under it. Mrs. Parker died in 1902, without issue. Mrs. Griffith is a widow with three children and no grandchildren, and the son, Henry Howard Brown, is alive and has a wife and a married daughter, who, with her husband, Thomas Earle White, and a child, Thomas Earle White, Jr., are also alive.

The clause in question is obscure, and in no event can receive a construction which is altogether satisfactory.

Where property is given to several for life and then over at their decease, it has been held in some cases to go over together on the death of the survivor, and in other cases to be distributed piecemeal on the respective deaths of the life tenants.

Where the gift over was a gift *per capita*, it was held in *Loring* v. *Coolidge*, 99 Mass. 191, that the words "at their death" took the fund over as a whole on the death of the survivor, and conversely in *Dole* v. *Keyes*, 143 Mass. 237, it was held that where the life tenancy lasted until the death of the survivor the gift over was a gift *per capita*. But on the contrary, where the gift over is to the issue of the life tenants *per stirpes*, the words

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"at their decease" have been construed to be taken distributively and to mean that the stock of each life tenant takes on the death of its ancestor. *Gardiner* v. *Savage*, 182 Mass. 521, following the English cases there cited, and those cited in *Loring* v. *Coolidge*, 99 Mass. 191, 192, to which may be added *Waldron* v. *Boulter*, 22 Beav. 284, and *In re Lavernick's estate*, 18 Jur. 304.

These are general rules of construction. The question in each case is what was the intention of the testator, and this intention is to be gathered from the particular provisions and the general scheme of the will, having in mind the general rules of construction as aids.

In the case at bar the general scheme of the will was equality among the testator's children. He gave each child $10,000 and an equal share of the residue, and in addition he provided against the possible improvidence of his children by putting in trust the $180,000 in question.

In the clause in question it is provided that the "children then living" of the testator are to share in the distribution when it takes place. That negatives the fund being kept together for the joint lives of the three life tenants. Again it is provided that the income is to be paid to the three "during the term of their natural life," and that the distribution is to be made "after their decease." That negatives the distribution being made on the death of the first life tenant to die. The use of the word "life" in the singular, if significant, tends to show that the testator was thinking of the life of each, and to make it probable that he used the words "at their decease" in a similar sense.

We have been asked by Mrs. White to construe the words "after their decease" to mean after their decease without issue; and by the guardian *ad litem* of Thomas Earle White, Jr. to construe the clause "equally among my children then living, and the issue of any deceased child or children giving to the issue of any deceased child the share to which the parent if living would have been entitled," to mean "among my issue then living, such issue to take according to the stocks," or that the gift to and among "my children" should be construed to and among "the children of my children." But we cannot do that. To do so

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would be to guess at what the testator may have meant instead of construing the words which he used.

Counsel for the son Henry Howard Brown have argued that the thing to be divided "after their decease" is the "rest and residue of the trust premises aforesaid," and that that provision is not consistent with a distribution of one third on the decease of the first life tenant. But little weight can be given to the words "rest and residue" in any event. If the provision "after their decease" is not taken distributively, the words "rest and residue" can have no effect because there would be in that contingency but one distribution, and that one a distribution of the whole, either on the death of the first or the last of the three life tenants. If the words "after their decease" are taken distributively, these words have a meaning when applied to the second and third distributions, although they have no meaning in connection with the first.

The clause "giving to the issue of any deceased child the share to which the parent if living would have been entitled," is on its face absurd when applied to the issue of the life tenant on whose death a distribution takes place of the share, to the income of which the life tenant was entitled during his life. But when applied to the issue of a pre-deceased life tenant on the distribution of the share of the second or last life tenant (speaking of a life tenant's share in the sense stated above) it is intelligible. And if it is taken to mean that the distribution among issue shall be *per stirpes* in all cases, it is intelligible in all connections.

Looking at the clause as a whole, and to the general scheme of the will, and bearing in mind the general rules of construction already established in this connection, we are of opinion that each of the three children became entitled to the income of an undivided third of the trust fund during their respective lives, that on the death of each life tenant there is to be a distribution of the principal of the third to the income of which that life tenant was entitled during his or her life, and that that third is to be then distributed among the children of the testator then living and the issue of deceased children including the issue of the life tenant whose share (in the sense stated above) is being distributed, such issue taking *per stirpes*. The objection to this construction is the treatment which is given by it to the

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issue of the life tenant whose share is being distributed, if that life tenant dies leaving issue. The general scheme of the testator is to treat the three children and their issue equally. And yet by this construction the issue who have had the misfortune to lose their ancestor have the added misfortune of seeing two thirds of the principal of his share go to the other two life tenants or those representing them *per stirpes*. The answer is that the representatives of the life tenant in question will get an equal amount from the other two shares when they are distributed, and a more equal provision is made for grandchildren than there would be made for them if we were to hold that the whole trust fund is to be kept until the death of the last surviving tenant; for under that construction it would have to be held that the income went to the surviving children of the testator until the distribution was made, leaving the children of deceased children of the testator unprovided for until then. And although a distribution of the whole on the death of the first life tenant who dies would insure equality, yet we do not feel at liberty to adopt that construction of the clause in view of the fact that the distribution is "after their decease," and the trust is to last "during the term of their [the life tenants'] natural life."

Decree accordingly.

GRACE McKAY *vs.* INHABITANTS OF READING.

Middlesex. March 17, 1903. — September 2, 1903.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Deed. Way.

A description in a deed from a religious society to a town of certain premises conveyed as "all the land now used as a common, containing two acres more or less, lying between" three streets named, followed by a covenant of the grantee that the land south of a certain row of trees should be forever used by the town as a common, was held to convey all of a triangle of land between the three streets named and to describe it as used as a common and containing two acres, and not to purport to convey only so much of the land described as then was used as a common.

Even before St. 1875, c. 163, (R. L. c. 58, §§ 17, 18,) no right of the public could be acquired by prescription by passing and repassing over a portion of an open common.

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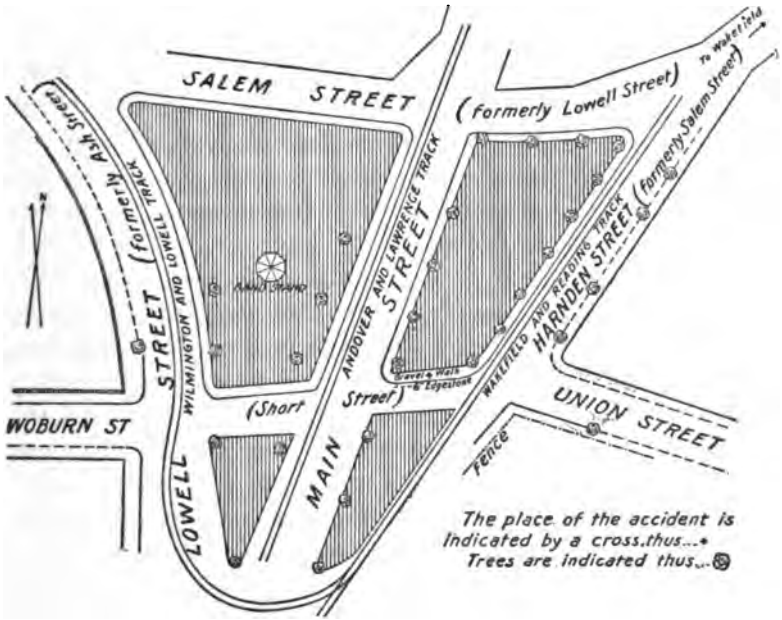
TORT for personal injuries from an alleged defect in a walk alleged to be part of a highway of the defendant. Writ dated November 18, 1899.

At the trial in the Superior Court before *Hardy*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

The following is taken from the plan referred to by the court, which was printed as part of the plaintiff's brief and was used



by both parties at the argument. The passage from the present Lowell Street on the west to Harnden Street on the east was called for convenience Short Street during the trial and at the argument.

W. B. Farr, for the defendant.

C. W. Clark, for the plaintiff.

LORING, J. This is an action for personal injuries suffered by a traveller from tripping over an indentation or rut three to six inches deep in a walk, caused by the washing away of the surface of the walk by rainwater. It appeared that the indentation or rut had been allowed to remain without being mended for some two weeks before the accident to the plaintiff. The defence set

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up was that the walk in question was part of a public common. If it was, the defendant is not liable. *Clark* v. *Waltham*, 128 Mass. 567. *Lincoln* v. *Boston*, 148 Mass. 578, 580. *Howard* v. *Worcester*, 153 Mass. 426, 427.

The accompanying plan shows the common in question. It is a triangular lot of land bounded by what are now Salem, Harnden and Lowell Streets. The plaintiff's contention is that what is called Short Street in the case was a public way through the common and included within its limits the walk in question on which the accident happened.

It appeared that the triangular lot of land mentioned above was an ancient common, the fee being in the Old South Parish, and that by an indenture dated August 4, 1853, between the parish and the defendant town, it was conveyed to the town, and the inhabitants of the town covenanted that it should "be forever used by the town as a common."

The defendant asked to have the jury instructed that there was no evidence that the walk where the plaintiff was injured was at the time of the accident part of one of the public ways within the town of Reading. This was refused, and the jury were instructed that the place where the accident happened was originally part of a public common and that the defendant was not liable unless it had become a public way by prescription.

The plaintiff now seeks to sustain the refusal to give this ruling by the contention that there was no evidence that Short Street was ever part of the common. This contention is based on the fact that the premises covered by the indenture of 1853 are described as "all the land now used as a common, containing two acres more or less, lying between Lowell [now Salem] Street, Salem [now Harnden] Street, and Ash [now Lowell] Street." She argues that the deed did not cover all the land between the three streets named in it but only so much of it as was then used as a common, and that there was no evidence that the part called Short Street was then or had been previously so used.

But in our opinion that is not so. In our opinion the deed is not a conveyance of so much of the parcel of land described as is used as a common; it is a deed of all of the parcel of land described, which parcel of land is used as a common and contains two acres more or less, and lies between Lowell Street, etc.

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Had there been any doubt of this being the true construction of the description of the premises covered by the indenture, it would have been dispelled by the covenant of the grantee that "the land south of the row of small trees south of the Old South Meeting House, shall be forever used by the town as a common." It is stated in the bill of exceptions that "The row of small trees was situated on the southerly side of what was then called Lowell Street" and is called Salem Street on the accompanying plan. All land shown on the plan south of what is now Salem Street is covered by the covenant, including the part called Short Street.

The presiding judge instructed the jury that the whole triangle, including the part called Short Street, had been formerly a common. In this he was, in our opinion, right. But he also told the jury that if Short Street had been used as a way continuously for twenty years prior to the enactment of St. 1875, c. 163, now R. L. c. 53, §§ 17, 18, adversely under a claim of right, it became a way by prescription. In this we think that he was wrong. There was no evidence of such user.

All that appeared in evidence was that persons going from Union Street to Woburn Street, or *vice versa*, were in the habit of passing over that portion of the Common which is called Short Street, and that they passed and repassed over this portion of the Common in carriages and on foot; that the wheel marks were where Short Street is shown on the plan, and that persons on foot were in the habit of going just north of the wheel marks, where there is now a walk shown on the plan. There was no evidence that the defendant town ever had constructed or repaired what is called Short Street as a street for travel. It did appear that in 1883 or 1884 a curb was put round the easterly of the four lots shown on the plan, and that the path where the plaintiff was walking was within the curb. The plaintiff's contention is that the place where she was walking had become part of a highway by prescription, and what took place in 1883 or 1884 did not change its character. But so long as a common is open, in the absence of regulations to the contrary it is the right of any member of the public to drive or walk across it, and his doing so will be taken to be the exercise of that right and cannot be made the ground for a title by pre-

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scription in himself or in the public. The principle is one of which there is no question and was applied by this court seventy years ago to the very point now before us. In *Emerson* v. *Wiley*, 7 Pick. 68, the defendant justified a trespass on the ground that the locus was a public highway, and undertook to show that it was so by evidence that it had been used by the public on foot, with cattle, horses and carts, for more than thirty years. But it appeared that the land when so used was an open common, and it was held that under these circumstances there was no evidence of user as a highway. Wilde, J., in delivering the opinion of the court, said: "The passing over a training field or open common, is no uncommon usage, and however long it may continue, it will not convert a field or common into a public highway." See in this connection *Langley* v. *Gallipolis*, 2 Ohio St. 107; *Cohn* v. *Parcels*, 72 Cal. 367. See also *Sprow* v. *Boston & Albany Railroad*, 163 Mass. 330. The plaintiff relies on the case of *Veale* v. *Boston*, 135 Mass. 187. That was a case where the city of Boston put a fence around Boston Common, and in doing so threw into Park Street what had been up to that time part of the Common; it then constructed over a part of this strip that portion of Park Street which was wrought for travel by horses and carriages, and it constructed a sidewalk over the balance of it. It was held that twenty years' use of this strip as part of Park Street, under these circumstances, made it a part of that public way. There was no such fencing out of a part of the common in the case at bar. There was a curbing put round that portion of the Common north of Short Street in 1883 and 1884. But that was after St. 1875, c. 163, and it is expressly stated in the bill of exceptions that "The plaintiff did not claim any additional rights by reason of what the town did upon that walk in 1883 or 1884." On the contrary the plaintiff's contention is that the use of Short Street "as a connecting link between Union Street and Woburn Street, as shown upon the plan, must have been adverse." In our opinion it was nothing more than the exercise of the right which the public had in an unfenced common and the repeated use in one part of the common does not change the character of the use.

Exceptions sustained.

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ANN SKEHILL *vs.* JOHN E. ABBOTT, administrator, & others.

Middlesex. March 18, 1903. — September 2, 1903.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Trust, Resulting. *Equity Pleading and Practice. Words*, "Aliquot."

In a suit by a widow to establish a resulting trust in certain land standing in the name of her late husband, it appeared, that the plaintiff had contributed $1,000 toward the purchase of the land for $2,500, that the plaintiff stipulated that her name should be in the deed and that it should appear in the deed for her interest in the property, and that her husband agreed to this but instead of keeping his agreement took the whole title in his own name. The trial judge found that it was understood between the plaintiff and her husband that she should have a two fifths interest in the land and that it was on that understanding that she parted with her money. *Held*, that on the finding a resulting trust was established.

Findings of fact by a judge sitting in equity will not be reversed on appeal unless plainly wrong.

BILL IN EQUITY, filed July 24, 1902, by the widow of Patrick Skehill, against the children of her late husband by a former marriage, to establish a resulting trust in certain real estate in Watertown.

In the Superior Court *Hardy*, J. found that a resulting trust had been established, and made a decree that two fifths of the property on Royal Street in Watertown standing in the name of the late Patrick Skehill should be set apart for the sole use and benefit of the plaintiff by partition, or, if partition should not be practicable, that the whole property should be sold and two fifths of the proceeds paid to the plaintiff.

The defendants appealed. The judge made a finding of facts, called memorandum for decree, and there also was a report of evidence by a commissioner appointed under Chancery Rule 35.

C. H. Innes, (*J. B. Ferber* with him,) for the defendants.

L. G. Blair, (*C. J. Flagg* with him,) for the plaintiff.

LORING, J. This is a bill in equity by a widow who claims an undivided two fifths interest in a parcel of land by way of a resulting trust. The title to the land was taken in the name of her husband, now deceased, but she contributed $1,000 of the $2,500 which was paid for it. The judge who tried the case

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found these facts: The plaintiff was sixty years old, was not able to read or write, and was ignorant of business methods and the meaning of legal instruments. It was understood between the plaintiff and her husband that she should have the benefit of the $1,000 contributed by her to provide for her old age, and it was at first suggested that this should be effected by the husband's taking the title and giving a mortgage to secure the payment of the $1,000. This was abandoned on the husband's reporting that a lawyer who was consulted by him had said that there could be no mortgage between husband and wife. The plaintiff then said that she wanted her name to be in the deed, and this was agreed to by the husband. In addition to these facts found by the judge there was evidence that the plaintiff not only stipulated that her name should appear in the deed, but what she insisted on was that it should appear in the deed for her interest in the property. The judge further found that in place of keeping his agreement the husband took the whole title in his own name, and the title remained in him until he died; and that although the plaintiff did not stipulate for an undivided two fifths interest in terms, yet that was what was understood between the plaintiff and her husband, and it was on that understanding that she parted with her money. We are of opinion that this brings the case within *Hayward* v. *Cain*, 110 Mass. 273, and takes it out of *McGowan* v. *McGowan*, 14 Gray, 119, *Snow* v. *Paine*, 114 Mass. 520, *Bourke* v. *Callanan*, 160 Mass. 195, and *Dudley* v. *Dudley*, 176 Mass. 34. See also *Bancroft* v. *Curtis*, 108 Mass. 47; *McDonough* v. *O'Niel*, 113 Mass. 92.

The defendants contend that unless a plaintiff has stipulated for such a fraction as is contained in the whole without a remainder no resulting trust can be created, that is to say, if one person contributes $500 where the purchase money is $2,500, stipulating for an undivided fifth interest, a resulting trust is raised in his favor, but if he has parted with $1,000 for the same purchase, stipulating for an undivided two fifths interest, he would not be entitled to anything by way of a resulting trust. They arrive at this extraordinary conclusion by finding first that the court in some of the cases cited above has said that it is not enough for a plaintiff to have contributed to the purchase money, but he must have stipulated for an aliquot interest in the prop-

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erty; and then by finding that it is laid down in the dictionaries that the word "aliquot" means something contained in another a certain number of times without leaving a remainder.

Whatever definition may be given in the dictionaries, the word "aliquot" was used in these opinions to mean a "particular fraction of the whole," as distinguished from a general contribution to the purchase money. To that effect see *McGowan* v. *McGowan*, 14 Gray, 119, 121.

The other point made by the defendants is that the judge was wrong in his findings of fact. There was a direct conflict between the witnesses on the question whether the plaintiff's $1,000 was lent to the husband or was contributed for an interest in the property. The judge saw the witnesses and heard the testimony of the plaintiff. It is enough that his decision was not plainly wrong. *Dickinson* v. *Todd*, 172 Mass. 183, and cases cited.

Decree affirmed.

HENRY C. HALL *vs.* INHABITANTS OF WAKEFIELD.

Middlesex. June 17, 1903. — September 2, 1903.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Way, Defect in highway.

In an action by a conductor of a street railway company against a town for injuries caused by an alleged defect in a highway, it appeared that the plaintiff, while attempting to pass around a superintendent standing on the running board of an open car, came in contact with a shade tree which was thirty-one inches from the body of the car and eighteen and one quarter inches from the outer edge of the running board. *Held*, that there was no evidence of negligence on the part of the town in failing to take measures to have the tree removed, and no evidence that the tree was a defect within the meaning of the statute.

TORT, by a conductor in the employ of the Wakefield and Stoneham Street Railway Company,* for injuries caused by an alleged defect in Main Street, a highway of the defendant, consisting of a maple tree with which the plaintiff's head came in contact while he was attempting to pass around a superintendent

* See 178 Mass. 98.

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of the railway company, who was standing on the running board of the open car of which the plaintiff was in charge. Writ dated December 19, 1898.

In the Superior Court *Lawton*, J. ordered a verdict for the defendant; and the plaintiff alleged exceptions.

R. W. Nason & T. W. Proctor, for the plaintiff.

M. E. S. Clemons, for the defendant.

KNOWLTON, C. J. This is an action to recover for injuries caused by an alleged defect in a highway in the defendant town. The plaintiff was a conductor on an electric car which passed three shade trees standing near the railway track, with one of which he came in collision as the car passed by. The only negligence alleged against the defendant is that it failed to make an effort to have the tree removed, as an object dangerous to travellers using the electric cars.

The town, as a municipal body, had no part in the location of the track in that place, but the general location was authorized by a board of public officers acting independently, and the track was laid by the street railway company. Pub. Sts. c. 113, § 7. St. 1898, c. 578. R. L. c. 112, § 7. Nor had the town a right to remove the shade trees. These were under the control of public officers. Pub. Sts. c. 54, § 6. St. 1885, c. 123. St. 1890, c. 196. R. L. c. 53, § 6. *Washburn* v. *Easton*, 172 Mass. 525. The provisions of the St. 1882, c. 154, had been accepted by the town, and at the time of the accident there was a duly elected board of park commissioners, but no tree warden. On May 31, 1893, these trees had been selected and designated to be preserved for purposes of ornament and shade by a formal vote of the selectmen. The only thing that the defendant could do for the safety of travellers on electric cars, if the tree was a defect, was to apply to the proper tribunal to have it removed. *Washburn* v. *Easton*, *ubi supra*. The question is whether the conditions were such as to make it the duty of the town to do this.

It appears that the nearest part of the tree was thirty-eight and one half inches from the nearest rail of the railway, and was thirty-one inches from the sill or side of the car, and was eighteen and one quarter inches from the outside of the running board. The plaintiff, at the time of the accident, was upon an

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open car, and the distance from the side of the car to the outer edge of the running board was thirteen inches. It is plain that there was no danger from the tree to passengers on the railway who were using due care. Passengers are not expected to ride with any part of their persons projecting thirty-one inches beyond the sill or side of the car. The town authorities had no reason to anticipate injuries to passengers from the tree, nor had they any reason to expect an injury to a conductor. If a conductor, in the performance of his duties, may take positions upon the car different from those of passengers, he is, at the same time, expected to take corresponding precautions. A conductor could not have charge of a car upon this track, without quickly observing the trees and noticing that they might call for particular care if he was about to swing around a man weighing more than two hundred and fifty pounds, standing on the running board. The town authorities had no reason to expect that a conductor would attempt to do this as the car was about to pass the trees, or if he attempted it, that he would fail to take precautions against coming in contact with a tree.

It is stated in the bill of exceptions that the plaintiff had been by these trees about one thousand times, and that he had never considered them dangerous trees. There was no more reason for the town authorities to consider them dangerous trees than for him so to consider them. His opportunity for observation in reference to their proximity to the car as it was passing, and in reference to the danger to one standing on the running board, was better than that of the town authorities.

We are of opinion that there was no evidence of negligence on the part of the town, in reference to its failure to take measures to have the tree removed, and there was no evidence that the tree was a defect within the meaning of the statute. This view of the case makes it unnecessary to consider various other defences relied on.

Exceptions overruled.

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JEREMIAH RILEY *vs.* NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY.

Suffolk. March 5, 1903. — September 3, 1903.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND, LORING, & BRALEY, JJ.

Telegraph Companies. Proximate Cause.

Under Pub. Sts. c. 109, § 12, (R. L. c. 122, § 15,) a telegraph company is liable to a traveller on the highway who in the exercise of due care is injured by a post erected and maintained by the company in accordance with a municipal license and without negligence. LATHROP, J. dissenting.

In an action under Pub. Sts. c. 109, § 12, against a telegraph company for personal injuries, it appeared, that the plaintiff was thrown from a provision wagon by its coming in contact with a telegraph pole of the defendant set inside the curbstone of a sidewalk, that beside the pole was a standpipe for filling watering carts, the dripping from which had caused a depression of small area two or three inches in depth in the cobblestone pavement near the curbstone; that the forward wheel of the plaintiff's wagon fell into this hollow, whereupon the body of the wagon lurched toward the pole and a portion of the wagon striking the pole the plaintiff was thrown out and injured. The pole was erected in accordance with a municipal license. *Held*, that under the statute the defendant was liable, if the plaintiff was in the exercise of due care, although the pole was maintained in accordance with the license and the defendant was not negligent. LATHROP, J. dissenting on the ground that the depression in the highway and not the pole was the proximate cause of the injury, as well as upon the construction of the statute.

TORT, under Pub. Sts. c. 109, § 12, (R. L. c. 122, § 15,) for personal injuries against a corporation authorized to construct and maintain telephone and telegraph lines. Writ dated February 1, 1900.

At the trial in the Superior Court before *Holmes*, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

The case was argued at the bar in March, 1903, before *Knowlton*, C. J., *Lathrop*, *Barker*, *Hammond*, & *Braley*, JJ., and afterwards was submitted on briefs to all the justices.

C. E. Washburn, (*A. S. Hutchinson* with him,) for the plaintiff.

E. K. Hall, for the defendant.

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KNOWLTON, C. J. The plaintiff was driving along Bridge Street in Cambridge, upon a market wagon, the hubs of whose wheels projected six inches beyond the rims and spokes. The body of the wagon had wings extending laterally as far as the hubs. A telegraph pole of the defendant was set close to the curbstone on the inside and it leaned a little towards the centre of the street. A standpipe used to fill watering carts stood beside the telegraph pole, and the dripping from it caused a sinking or depression in the cobblestone pavement, small in area, but two or three inches in depth near the curbstone and opposite the telegraph pole. As the right forward wheel of the plaintiff's wagon fell into this hollow, the body of the wagon lurched to the right toward the pole, so that the wing struck the pole, and the collision threw the plaintiff out and injured him. The pole was erected in accordance with a license granted by the board of aldermen, which required the defendant to maintain it as nearly perpendicular as practicable. There was a question whether its leaning was a departure from the requirements of the license.

The plaintiff asked the judge to instruct the jury as follows: "The defendant is liable to the plaintiff in this action if the latter, while travelling on the public highway, and in the exercise of due care, was injured by reason of a telegraph pole belonging to the defendant, although said pole was erected and maintained by the defendant in accordance with the license granted by the board of aldermen of the city of Cambridge." The judge refused to give the instruction requested and gave the jury this instruction: "If you find that the pole was erected and maintained in accordance with the specifications of the municipal officers, and that there was no negligence on the part of the defendant in its construction or maintenance of the pole, then the plaintiff cannot recover, even if in the exercise of due care, in the absence of any direction by the municipal officers to alter the location or construction of said pole." The exceptions to the refusal and to the instruction, bring us to the consideration of the statute under which the pole was erected. The St. 1851, c. 247, § 2, is as follows: "Whenever injury shall be done to any person, or to the buildings or other property of any person or corporation, by the posts, wires, or other apparatus of any telegraphic line, the company or individual, being proprietor of the

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same, shall be held responsible in damages to the person or corporation so injured." The St. 1859, c. 260, which was doubtless enacted to change the law stated in *Young* v. *Yarmouth*, 9 Gray, 386, provides that "Towns which may be otherwise liable in damages to any person for injury to his person or property, occasioned by telegraphic posts or other fixtures erected on highways or town ways, shall not be discharged from such liability" by reason of anything contained in the act authorizing the erection of such posts, and makes the companies erecting the posts or fixtures liable to reimburse and repay to towns the full amount of damages and costs recovered by any party injured. These two statutes were combined in the Gen. Sts. c. 64, § 11, with a slight change, and re-enacted in Pub. Sts. c. 109, § 12, and again re-enacted with only verbal changes in the R. L. c. 122, § 15.

The first of these two statutes creates a liability without any reference to negligence. The Legislature seems to have recognized that the erection of the poles and fixtures in public ways, would create obstructions which might interfere to some extent with the use of the public streets and increase the liability of travellers to accidents. Such obstructions, whether placed in a sidewalk or in a part of a street designed for use by vehicles, being there when the streets are lighted and when they are in darkness, and in every variety of possible conditions, subject persons in the exercise of due care to risks which otherwise would not exist. While the Legislature saw fit to authorize the use of the streets for telegraph lines, it provided at the same time that the telegraph company should be liable for damages to all persons injured in person or property by these erections.

Doubtless the fact that electricity is a subtle and dangerous agency, which was less understood in 1851 when this statute was enacted than it is now, was an added reason for creating this legal liability without regard to negligence. Wires and other apparatus, as possible causes of injury, are treated by the statute like the posts. It might be difficult to prove, in case of an injury by a transmitter of electricity, whether the injury was caused by negligence or by pure accident. The statute indicates an intention on the part of the Legislature, that these erections in the street, which in many places would constitute a public nuisance if not authorized by the statute, should be permitted only upon

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condition that those who use them to their own profit should make compensation for damages caused by them.

Both the principle involved and the statutory declaration of liability are substantially the same as appear in R. L. c. 102, § 146, which declares that "The owner or keeper of a dog shall be liable in an action of tort to a person injured by it in double the amount of damages sustained by him." The keeping of dogs is authorized by law, and in many cases is meritorious. Usually, in individual cases, it is not attended with obvious danger, but the fact that it materially increases the risk of injury to innocent persons, is a reason for making dog owners liable for injuries caused by their dogs, even though the owners are free from fault. We are, therefore, of opinion that this instruction should have been given.

The second instruction requested, that "contributory negligence on the part of the plaintiff is no defence to this action unless so gross as to amount to fraud," was rightly refused. In this respect the statute is like that last quoted. The statute as to dogs is silent in regard to care on the part of the injured person. But owners of dogs are not insurers against injuries inflicted by them upon persons whose negligence contributes to the injury. *Munn* v. *Reed*, 4 Allen, 431. *Plumley* v. *Birge*, 124 Mass. 57. To make a defendant, under this statute, an insurer against injuries to persons whose own fault is one of the causes of the injury imposes too great a liability upon the corporation. It would be contrary to the usual rule of liability in actions of tort, where the cause of the liability is not more culpable than negligence. The language of this statute does not indicate that this absolute liability to persons injured, applies to persons who, by their own conduct, would be precluded from recovery against a defendant in an action for negligence.

The R. L. c. 111, § 270, in relation to the liability of railroad companies for damages by fires kindled by sparks from locomotive engines, deals with a different kind of subject and it has been construed a little more strictly. *Bowen* v. *Boston & Albany Railroad*, 179 Mass. 524. Railroad companies are held accountable for fires set by their engines under ordinary conditions. The condition of the property does not ordinarily contribute as an active agent to the kindling of the fire. It is a passive state

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which was contemplated when the statute was passed. That statute leaves the owner entitled to his remedy unless guilty of gross negligence which is culpable.

The instructions in regard to the duty of the plaintiff in reference to care, and as to what constitutes due care of a plaintiff in a case like this, were correct and sufficient. The third request for instructions was rightly refused.

Exceptions sustained.

LATHROP, J. I am unable to agree with the opinion of the majority of the court. If the only question involved were that of the construction of a statute I should not write a dissenting opinion, but as there are other questions involved, which I have pointed out to my brethren, but to which no answer is made in the opinion, I feel justified in discussing the whole case.

I understand that while there was evidence that the pole leaned a little, the instruction asked for assumes there was no fault on the part of the defendant; and that the opinion of the majority proceeds upon the theory that the pole was properly placed and maintained. While this pole was next to the inner edge of the curbstone, its base, as appears by the bill of exceptions, was nine inches from the outer edge of the curbstone, and so it is manifest that if the wagon had remained in an upright position, and the pole had been upright no part of the wagon could have struck the pole. As is stated in the opinion of the majority, there was a defect in the street into which one of the fore wheels went, and this caused the wagon to lurch and to throw the top of the wagon against the post, throwing the plaintiff out and causing the injury. It seems to me very clear that the defect in the highway, and not the post was the proximate cause of the injury. The majority of the court liken the statute under consideration to the dog law, but there is a dog case precisely in point. In *Sherman* v. *Favour*, 1 Allen, 191, a man was driving along a highway in a chaise drawn by a horse. A dog attacked the horse, and the horse was frightened. While the driver was attempting to guide the horse, one of the reins broke, and the chaise struck against a post on the side of the way and was damaged. The attack of the dog was held to be the proximate cause of the injury. I venture to think that in the present

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case the proximate cause of the injury was the defect in the street and not the pole.

The dog law was first enacted by the St. of 1791, c. 38, § 4, and applies to a case where a dog assaults a person, and not to a case where a dog is the passive cause of the injury. Thus in *Sherman* v. *Favour*, 1 Allen, 191, it was said by Chief Justice Bigelow: "We do not mean to say that any liability would be incurred for an accident or injury caused by the mere presence or passing of a dog, when no act is done or attack made by him; as, for instance, where a horse is frightened merely by seeing a dog lying or running in the street. In such case, the dog would be only the passive cause of the injury."

If however these questions are not worthy of consideration, it is necessary to consider the construction of the statute. In the first place it is to be noticed that it applies only to poles of a telegraph company, and not to those of a telephone or of an electric light or power company. See R. L. c. 122. And it has been held that an electric light company is not liable irrespective of negligence. *Hector* v. *Boston Electric Light Co.* 161 Mass. 558. *Illingsworth* v. *Boston Electric Light Co.* 161 Mass. 583. *Griffin* v. *United Electric Light Co.* 164 Mass. 492. *Reagan* v. *Boston Electric Light Co.* 167 Mass. 406. *Hector* v. *Boston Electric Light Co.* 174 Mass. 212.

If therefore the opinion of the majority is right our statutes impose a liability on a telegraph company for the mere keeping of a licensed pole on a highway, while no such liability is imposed on a company owning similar poles and using a far more dangerous current of electricity.

It seems to me that the view taken by the majority of the court is one which ought not to be reached. The question is not a new one, though it has not before been definitely decided. It was considered by Mr. Justice Hoar in *Commonwealth* v. *Boston*, 97 Mass. 555, 558, a case arising under the Gen. Sts. c. 64, § 11, which is the same as the one before us. He uses this language: "Whether the eleventh section is to be construed as giving or preserving a right of action, where the injury is caused by the mere placing of the poles at the places appointed for them, may perhaps admit of doubt. The liability of the poles to decay and fall, or to lean over, and of the wires to become displaced, would

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give the provision effect, if the right of the original location of them were regarded as unquestionable."

These remarks of Mr. Justice Hoar seem to me to be the true rule in the case. The opinion of the majority holds that the plaintiff must be in the exercise of due care. This is reading the law of negligence into the statute, so far as the plaintiff is concerned. It seems to me just as reasonable to read the same law into the statute as to the defendant.

It will be curious to see how far the majority of the court will carry its interpretation of the statute. It frequently happens at the present time that an automobile gets beyond the control of the person in charge, and plunges into a telegraph pole outside the travelled part of the way, and the automobile or the person in charge is injured. Is the owner of the pole to be held liable? Again, an open trolley car leaves the track owing to a defective rail, and a passenger is thrown against a telegraph pole. Is the owner thereof liable?

I cannot think that the Legislature intended any such consequence to result, from the language used in the statute. Statutes are to be construed reasonably, and it seems to me that the construction put by the majority of the court tends to most unreasonable results.

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GEORGE B. CASSADY *vs.* OLD COLONY STREET RAILWAY COMPANY.

KEZIA P. CASSADY *vs.* SAME.

Plymouth. March 18, 1903. — September 3, 1903.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Negligence. Street Railway.

In an action against a street railway company by a passenger for personal injuries, the ordinary burning out of a fuse on an electric car is not *prima facie* evidence of negligence, but when there is evidence that the burning out of a fuse was attended by unusual results which would not have occurred if the fuse had been in proper condition, and that the fuse was so placed in the car that if there should be a harmful flame from its burning out it reasonably might be apprehended that the flame would reach and injure a passenger, there is evidence to go to the jury of negligence on the part of the defendant.

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In an action against a street railway company for injuries from an explosion and flame attending the burning out of a fuse in a box placed directly under the seat of an open electric car on which the plaintiff was sitting, there was evidence which would warrant the conclusion that the intensity and duration of the flame produced by the explosion was greatly in excess of what could have been the result if the fuse had been in proper condition and that this imperfect condition of the fuse could have been discovered by the use of reasonable care. *Held*, that the defendant was not entitled to a ruling that the doctrine of *res ipsa loquitur* did not apply, and that the jury properly were instructed that it was for them to decide how far negligence could be inferred from the accident itself.

In a case where the doctrine of *res ipsa loquitur* applies, an unsuccessful attempt by the plaintiff to prove by direct evidence the precise cause of the accident does not estop him from relying on the inference of negligence from the accident itself.

In this action against a street railway company for injuries from an explosion and flame attending the burning out of a fuse in a box placed directly under the seat of an open electric car on which the plaintiff was sitting, it was held that the evidence stated by the court was sufficient to justify the jury in finding that the plaintiff was physically injured by the flame or electricity or both combined, and not merely frightened.

TWO ACTIONS OF TORT, the first by the husband of Kezia P. Cassady for consequential damages, and the second by Kezia P. Cassady herself for personal injuries from an explosion and flame attending the burning out of a fuse on an open electric car of the defendant on which the plaintiff was a passenger. Writ dated December 14, 1901.

In the Superior Court the cases were tried before *Hardy*, J., who refused twenty-one rulings requested by the defendant. The jury returned a verdict for the plaintiff in each case; and the defendant alleged exceptions.

D. E. Hall, (*H. F. Hurlburt* with him,) for the defendant.

G. R. Swasey & T. H. Buttimer, for the plaintiffs.

HAMMOND, J. The first ground of defence is that there was no evidence of negligence of the defendant. It is conceded that the fuse burned out, but the defendant contends that the burning out of a fuse is not negligence *per se*, nor does it import negligence.

The box containing the fuse was fastened to the sill of the open car, at a place directly underneath the portion of the seat upon which Mrs. Cassady was sitting. A fuse consists of a piece of metallic alloy, similar in nature to soft solder, one or more inches in length, connected at each end with a small circular piece of copper. These pieces of copper are called the termi-

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nals, and they are so cut that they can easily be slipped under the thumb screws and clamped in place. The fuse and thumb screws are held in what is called the fuse-box. A wire leading from one thumb screw up through the roof of the car to the trolley wire conducts the electricity from the trolley wire to the box. From the other thumb screw there is a wire leading to the motors. When the two screws are connected by the fuse there is a direct path for the electricity from the trolley wire to the motors. The purpose in using the fuse is to protect the wiring and the motors from an excessive current of electricity. It is constructed to withstand something less than the maximum current which the wires and motors are capable of carrying. When the current of electricity exceeds the maximum strength of the fuse, the metallic alloy melts with more or less of a report and flame and, the electrical path between the trolley wire and motors being thereby broken, the wire and motor are saved from possible harm. As the safety valve in a locomotive engine allows the escape of steam when the pressure is too strong for safety or for the ordinary operation of the engine, so in electric cars the fuse is used to protect the electrical mechanism from injury which might otherwise arise from the variations in the electrical current which are practically unavoidable in the operation of the trolley cars.

A fuse of the character above described is in general use upon cars run by electrical power. It is a safety device, and the evidence in this case shows that in view of the rapid action of electricity, the practical difficulty of controlling it at all times, the inability of the motorman to ascertain the amount of power upon the wires or on the motors, the variable weight of the load to be carried, the reasonably necessary conditions of the traffic as to weight of machinery and cost of transportation, it is a proper device. It is intended to prevent harm to the machinery which otherwise might result from the practically unavoidable fluctuations of the power. The fuse is expected to burn out when for any cause the electrical current exceeds its carrying capacity; and the evidence of the experts in this case shows that in the ordinary operation of cars properly wired and equipped, such an event is liable often to happen without negligence upon the part of any one. When, therefore, a fuse burns

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out, it cannot be said that the connection between the occurrence and negligence is such as, in the absence of other evidence, to justify the conclusion that the result was due to negligence. As well might it be said that the escape of steam from the safety valve of a locomotive engine momentarily stopping at a station is evidence of negligence. The ordinary burning out of a fuse therefore is not *prima facie* evidence of negligence, and if there had been nothing else in this case the defendant would have been entitled to a verdict.

But the jury may properly have found that there was something else in this case. The expert evidence on both sides showed that the report, flash and vapor-like puff attendant upon the burning out of a fuse like this when in proper condition are instantaneous and harmless, and no physical injury either by burning or by an electrical shock could be expected to result therefrom. The evidence for the plaintiff tended, however, to show something more than a mere instantaneous, harmless flash. Upon this Mrs. Cassady testified as follows: "I was sitting on the car, and all at once a large flame of fire, or a blaze, came all over me, and I sprang off my seat and started to go out of the car on the other side of the car and a lady prevented me and pushed me back, and that 's the last I remember until about three weeks afterwards, when I found myself in bed." Her daughter, who was seated a few seats in the rear of the one upon which her mother sat, testified that she "saw a flash of fire come into the car right over my mother, on the left hand side; and she sprang away from it. . . . The flame seemed to come up and over her; to come from under the seat. . . . The duration of the flame was a few seconds"; she could not tell how long it lasted, but it was long enough for her "to see it plainly come in the car and flash right over" her mother. "The flame only partly enveloped" the person of her mother; "I should say it came over half of her face and body." Again she says: "As the car started up the hill there was this flash and flame. . . . I saw this flash or flame come up around or near my mother."

Henry O. Rideout, a witness called by the plaintiffs, testified that at the time of the accident he was driving a two-seated carryall, and that he "saw a flame and smoke come out of a

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car ahead." He continued: "It might have been a flame of three or four seconds' duration. It came up over the side of the car, seemed to come from underneath, I don't know where. I was too far away to tell. . . . I was probably a hundred yards behind the car at the time. I was on the same side of the car that the flame was. . . . I noticed the flame more than I did the smoke. I can't say, from where I was, whether the flame went inside or within the car."

Henry A. Rideout, another witness called by the plaintiff, testified that he was the father of the preceding witness, and at the time of the accident was driving in a team ahead of his son; and continued: "I saw a flash of light. . . . The car was ahead of me. I was driving towards it and was about the length of this room from it. I simply saw a flash of light and then I had to attend to my horse. . . . It was quite a flash of light come out near the front end of the car, I thought. My horse saw it, and of course shied, and I had to pay more attention to the horse. . . . I don't recollect seeing any smoke."

As to the witnesses called by the defendant, one Thompson testified that he was sitting directly opposite the female plaintiff; and continued: "As the car was going the fuse blew out. . . . There was a kind of a puff and there was some smoke kind of come into the car; looked to me like smoke. Everybody jumped. I jumped. There was this smoke and, I suppose, flame together, but I did n't notice much flame." On cross-examination he said: "My clothing was not burned and I never told anybody that it was. It might have been scorched: I smelled the scorch of it."

One Hunt, who was seated by the side of the preceding witness, did not notice any smoke, vapor or flame.

The conductor on the car testified that at the time he was standing on the running board on the right hand side of the car, at about the fifth seat from the front, collecting fares; heard a slight noise, did not turn around instantly, but soon turned and saw no flame but only "a slight vapor."

One McPhee testified that he was four hundred or five hundred feet behind the car at the time the fuse burned out. The first thing which attracted his attention was the stopping of the car, and he saw no flash or flame.

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So much as to the testimony of the witnesses as to what they saw at the time.

There was evidence also tending to show that the flame existed long enough to burn. The jury may have believed that holes were made by the flame in the veil worn by Mrs. Cassady at the time of the accident. The daughter testified that she went to her mother while in the car immediately after the accident, and that she then noticed that little red blotches were breaking out all over her mother's face; that while bathing her mother's face a few hours afterwards at home, she noticed a "fine red mark about an inch or an inch and a half long," near her mother's left eye, and that her eyebrows appeared as if they had been "scorched or burned off," and that there was a very slight appearance of scorching of hair elsewhere near the face.

Margaret Pierce, called by the plaintiffs, testified to the existence of "red marks or spots" on the left side of the eye and just above the eye, and to the scorched appearance of the eyebrows and hair. The evidence as to these spots and marks was confirmed by several other witnesses. The plaintiffs contended that these holes in the veil, these spots and marks upon the face, and this scorching of the eyebrows and hair were caused by the flame. It is true that the expert testimony for the defence tended to show that there could have been no such flame, and hence that there could have been no such burning, but an irreconcilable conflict between what eye witnesses say they saw and what expert witnesses say could not have happened is not unusual in the trial of causes; and within reasonable limits the jury may decide upon which they will rely. The jury upon the evidence may have found that the flame in this case was not the instantaneous and harmless flame which results from the burning out of a fuse when in proper condition; that the burning of this fuse was attended with unusual results which would not have occurred if the fuse had been in proper condition, and that the most reasonable conclusion was that if proper care had been exercised there would have been no such flame. We cannot say that such a conclusion was not warranted by the evidence.

Moreover there is another feature in this case of some importance. This was an open car, and this fuse box was placed

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directly under a seat intended for passengers, so that if, for any reason, there should be a harmful flame resulting from the burning out of a fuse, it might be reasonably apprehended that it would reach and injure a passenger. While therefore the mere burning out of a fuse properly located and in proper condition does not of itself import negligence on the part of the defendant, still, if the fuse be so located as by its burning out to injure a passenger, such a location may be inconsistent with the degree of care which a common carrier owes to its passengers. It would be something like arranging the safety valve of a locomotive engine so that the escaping steam might reach a passenger in his seat. Upon the whole, we think that the plaintiff had a right to go to the jury on the question of the negligence of the defendant.

It is very strongly urged by the defendant that in a case like this the doctrine of *res ipsa loquitur* does not apply, and in its sixteenth request it asked for an instruction to that effect. The judge instructed the jury that the mere fact that the accident occurred is not in and of itself as matter of law *prima facie* evidence of negligence; and continued as follows: "That is, you cannot assume, just because an explosion may have occurred in connection with the testimony in this case and the procedure in this case, that that is of itself negligence as matter of law. I cannot instruct you, as matter of law, that you are to find that *prima facie* evidence of negligence. But it is some evidence of negligence. It is for you to consider that as evidence tending to show negligence, but it is a question of fact for you to decido how far that shows negligence." There was no error in refusing to give the ruling requested. There was evidence, as above stated, which would warrant the conclusion that the intensity and duration of the flame produced by this explosion was greatly in excess of what could have been the result if the fuse had been in proper condition, and that this imperfect condition of the fuse could have been discovered by the use of reasonable care. Such being the case, the defendant was not entitled to the ruling requested. And the jury were properly instructed that the matter was before them to decide how far negligence could be inferred from the accident itself. If the defendant desired to call the attention of the court to the precise phase of the testimony

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where the principle would not apply, it should have done so more distinctly.

The defendant also contends that even if originally the doctrine would have been applicable, the plaintiff had lost or waived her rights under that doctrine, because instead of resting her case solely upon it she undertook to go further and show particularly the cause of the accident. This position is not tenable. It is true that where the evidence shows the precise cause of the accident, as in *Winship* v. *New York, New Haven, & Hartford Railroad*, 170 Mass. 464, and *Buckland* v. *New York, New Haven, & Hartford Railroad*, 181 Mass. 3, and similar cases, there is of course no room for the application of the doctrine of presumption. The real cause being shown, there is no occasion to inquire as to what the presumption would have been if the cause had not been shown. But if at the close of the evidence the cause does not clearly appear, or if there is a dispute as to what it is, then it is open to the plaintiff to argue upon the whole evidence, and the jury are justified in relying upon a presumption unless they are satisfied that the cause has been shown to be inconsistent with it. An unsuccessful attempt to prove by direct evidence the precise cause does not estop the plaintiff from relying upon the presumptions applicable to it.

The defendant strenuously contends that there was no evidence of physical injury either by the flame or by electricity, and that the sufferings of the plaintiff were due simply to fright. It would not be profitable to recite further in detail the evidence bearing upon this question. The charge to the jury was sufficiently full and clear upon this point, and while a decision for the defendant might reasonably have been expected, still we cannot say that the jury could not find upon the evidence that the plaintiff was physically injured by the flame or electricity, or both combined.

It was within the discretion of the judge to allow the question to be put to Morse the expert, concerning the possibility of an electric shock.

No error appears in the manner in which the judge dealt with the requests of the defendant.

Exceptions overruled.

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ALEXANDER B. CLARK *vs.* JUSTIN J. HULL.

Essex. November 5, 1902. — September 4, 1903.

Present: MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Way. Evidence. Words, "Highway", "Road."

In an action for trespass to the plaintiff's close on a neck of land reached by a causeway, the defendant contended that at the time of the alleged trespass he was in the rightful use of a public way. Ancient records put in evidence showed that there was at the time of those records a highway over and beyond the causeway and that a gate across the causeway was put up to keep cattle in, there being evidence that it was maintained there only during the pasturage season and removed at other times. There was testimony of old men of a road reported to be ancient and of the use of this road from time immemorial by many persons under a claim of right and of repairs made by such persons and by the surveyor of the district, and that the way in controversy was identical with this ancient road. The jury found for the defendant. *Held*, that the verdict was justified, there being evidence to show a public way by prescription or dedication before the enactment of St. 1846, c. 203.

On the issue of the existence of an ancient public way leading to a neck of land, United States coast survey charts are admissible to show the existence of a way without regard to the question of whether the way was public or private.

LATHROP, J. This is an action of tort for breaking and entering the plaintiff's close. The answer contained a general denial, and further set up that the close was crossed by a public way, and at the time of the alleged trespass the defendant was on the way in the rightful use thereof.

At the trial in the Superior Court it appeared that the close described in the declaration was Eagle Hill so called, which is a portion of a tract of land of about five hundred acres called Jeffries Neck, or Ipswich Great Neck, situated in the easterly part of the town of Ipswich, bordering on Plum Island River and the sea, and bounded on the north by the Ipswich River and Little Neck. It also appeared that there had been for a long time in Ipswich a road called East Street, which extended from Ipswich in the direction of Jeffries Neck for a distance of about a mile and a half; that this road extended down to the marsh over which is a causeway leading to the upland of Jeffries Neck pasture.

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At the close of all the evidence the plaintiff requested the presiding judge to rule that the evidence introduced by the defendant was insufficient in law to prove the establishment of a public way, or to make out a justification for the trespass, and requested the judge to direct a verdict for the plaintiff for nominal damages. The judge refused so to rule, and submitted the case to the jury upon full instructions not objected to. The jury returned a verdict for the defendant; and the case is before us on the plaintiff's exceptions.

The principal exception is to the refusal to give the ruling above referred to. The defendant produced ancient records of the town of Ipswich referring to the "highway" or "way" to Jeffries Neck, which made provision for the repair of the way, establishing a fence and gate in the way, "the charges of it to be laid upon the owners of the cattle that go in the neck." These records bear date from 1635 to 1652.

He also put in evidence certain ancient deeds referring to the "road" and to the "great road leading to Jeffries Neck," also certain ancient plans tending to show the existence of a way, beyond the gate to one or another different points beyond the gate across the causeway, also certain charts of the coast survey the latest of these being made in 1857, indicating a way leading from Ipswich to the southern bank of Green River. These were identified by a witness as the way in question and as terminating at Eagle Hill landing.

The defendant also introduced the testimony of old men tending to show a well defined and well travelled way from Ipswich to Jeffries Neck over the premises described in the declaration, at least to the upland inside the gate, and a more or less defined way from this point to the landing; that this road was by reputation an ancient road, and was used by the inhabitants of the town engaged in the clamming industry at Eagle Hill landing, and by the inhabitants of Plum Island; and that cattle had been pastured within the gate from time immemorial; that the place where the cattle were pastured was surrounded by water, except where the causeway crossed a certain creek, where from time immemorial a gate had been maintained during the pasturage season, and removed at other times.

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The defendant also put in evidence of user of the road from time immemorial by many persons under a claim of right, and of repairs made by them and by the surveyor of the district.

The plaintiff, who claimed title through the proprietors of Jeffries Neck, put in evidence the records of said proprietors, dating from 1751, which tended to show ownership of the way in question, and of non-acquiescence in any adverse user of the way, as well as steps taken to prevent trespassing.

Strictly speaking, the only question before us is as to the defendant's evidence, as the plaintiff did not ask for a ruling on all the evidence. We are of opinion that on the defendant's evidence it was a question of fact for the jury under proper instructions, whether the way was a public way; and certainly it was a question for the jury on all the evidence.

The ancient records put in evidence by the defendant show that there was at that time a way or highway leading to Jeffries Neck. The word "highway" in a popular sense includes all public travelled ways, whether county or town ways. *Jones* v. *Andover*, 6 Pick. 59. *Commonwealth* v. *Hubbard*, 24 Pick. 98. So, of the word "road." *Stedman* v. *Southbridge*, 17 Pick. 162, 164.

The records also showed that the gate across the causeway was put up to keep the cattle in; and the jury might well draw the inference that from time immemorial it had been used for that purpose only.

The fact that there was no evidence of a public lay out of this way is not conclusive. Before the statute of 1846, c. 203, a way might become a public way by dedication or prescription, and the statute does not apply to ways of the latter class. *Commonwealth* v. *Coupe*, 128 Mass. 63, and cases cited. *White* v. *Foxborough*, 151 Mass. 28, 44. We can have no doubt that the evidence in this case was sufficient to show a public way by prescription or by dedication before the St. of 1846.

There was also much evidence to show that the way in controversy was identical with the ancient road.

The cases principally relied on by the plaintiff are cases where the ways were private in their inception and there was no evidence of dedication or of acts adverse to and acquiesced in by the owner. *Durgin* v. *Lowell*, 3 Allen, 398. *Sprow* v. *Boston & Albany Railroad*, 163 Mass. 330. In the present case,

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the acts of user were grounded upon evidence that the way was a public way in ancient times.

The case of *Slater* v. *Gunn*, 170 Mass. 509, upon which the plaintiff also relies, came to this court on exceptions to a master's report, which had been overruled by a judge of the Superior Court. The master stated that he did not find that the travel had been of a nature, or an extent, or under a claim of right, which would give the public an easement by prescription over the way as a public way. This was regarded as in effect a finding that the public had not acquired a right of way. It is said by the court: "There was nothing in the nature of the use described which, as matter of law, required the master to find that it was adverse and under a claim of right, or that the roadway had become a public way by dedication." The evidence did not come before this court, and the questions arose simply on the master's report which was in favor of the plaintiff. The only question was whether the master was bound, as matter of law, to find otherwise than he did.

In the present case the tribunal of fact having found for the defendant, the only question is whether there was anything to go to the jury. There are also other differences in the evidence which distinguish the two cases.

There are several other exceptions which remain to be considered.

The plaintiff at the argument contended that certain deeds put in evidence were not ancient deeds, and clearly they were not. They were introduced in connection with ancient deeds, and apparently for the purpose of identifying the land as part of the same conveyed by the ancient deeds. Whatever was the purpose of their introduction, there is nothing in the bill of exceptions to show that any objection or exception was taken to their admission.

The plaintiff excepted to the admission of the coast survey charts before mentioned. No ground of objection to their admission was made at the trial. On the plaintiff's brief the objection is made that they had no tendency to prove a public way, and because the surveyor who drew the plans was not endeavoring to determine what were public or private ways, and had no authority to do so.

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We have no doubt that these charts were admissible to show the existence of a way on Jeffries Neck, and if the plaintiff wished to limit their use in evidence he should have asked for an instruction to this effect. There is nothing in the bill of exceptions to show that they were admitted for the purpose of enabling the jury to decide whether the way was public or private.

The U. S. St. of February 10, 1807, § 1, authorizes the President of the United States "to cause a survey to be taken of the coasts of the United States, in which shall be designated the islands and shoals, with the roads or places of anchorage, within twenty leagues of any part of the shores of the United States; and also the respective courses and distances between the principal capes, or headlands, together with such other matters as he may deem proper for completing an accurate chart of every part of the coasts within the extent aforesaid." 2 U. S. Sts. at Large, 413. See also U. S. Rev. Sts. § 4681.

It is an essential part of a coast survey chart that it should show a strip of the coast, with more or less of the natural and artificial features delineated upon it as to render it serviceable. It would be of no value if the coast line were not shown. These charts were official acts of the government of the United States, to say nothing of their being ancient charts. See *Whitman* v. *Shaw*, 166 Mass. 451, and cases cited.

The plaintiff contended that the road over the marsh and across the locus was opened by the commoners of Ipswich for their own convenience, and offered the records of the commoners to show the transfer of the title of Jeffries Neck from the commoners to the Proprietors of Jeffries Neck pasture in 1708–9. Upon the offer of the records the presiding judge asked the defendant's counsel, "Is there any question that the former ownership of the land bordering upon this way was in the commoners?" The counsel said, "No." The judge then said to the plaintiff's counsel, "Any record that you have in reference to this way, you may put in. I exclude the rest." The plaintiff excepted. He now contends that the records tend to show that the ancient records of Ipswich put in by the defendant were in part records of the commoners, and that the causeway and the road inside the gate were opened by the commoners for

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their own use. But the excluded records were offered merely to show a transfer of title, and there was no question about the title. The evidence was properly excluded under the offer of proof made. See *Holt* v. *Sargent*, 15 Gray, 97.

Some other exceptions were taken by the plaintiff, but, as they were not argued, we treat them as waived.

Exceptions overruled.

C. A. Sayward, (*H. P. Moulton* with him,) for the plaintiff.

A. P. White, (*G. H. W. Hayes* with him,) for the defendant.

CHARLES BASSETT, administrator, *vs.* DARIUS M. NICKERSON, JR., executor.

Barnstable. March 12, 1903. — September 5, 1903.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND, LORING, & BRALEY, JJ.

Practice, Civil. Devise and Legacy.

A will, after giving certain legacies, contained the following: "I give, devise and bequeath to my niece, S. my present housekeeper, all the rest and residue of my estates, both real and personal that I may die possessed of, after paying the above named legacies and my funeral expenses and all other debts that I may be owing at my decease (if any) and after the payment of the above named debts and legacies I hereby give her, my said niece, S. full power to do with the remainder of my said estates as she may deem most proper during her natural life." By a codicil the testator gave $500 to the treasurer of a certain cemetery for designated purposes "providing there should be so much remaining or whatever there might be remaining at the decease of my niece S. and the payment of all her funeral and legal expenses are paid." *Held*, that S. took a fee in the real estate and an absolute estate in the personal property, the words as to the power to dispose of the property during her life being superfluous, and that the bequest in the codicil to the treasurer of the cemetery was void as an attempt of the testator to control after the death of S. property which he had given to her absolutely.

APPEAL from a decree of the Probate Court of the County of Barnstable.

The case came on to be heard before *Loring*, J., who at the request of the parties reserved it for determination by the

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full court, such decree to be entered as law and equity might require.

The case was submitted on briefs at the sitting of the court in March, 1903, and afterwards was submitted on briefs to all the justices.

D. M. Nickerson, Jr., pro se.

T. H. Armstrong, for the residuary legatees under the will of Sarah A. K. Turner.

C. H. Cahoon, for the heirs at law of Clement Kendrick.

LATHROP, J. While this case is before us in a very irregular manner, yet as all parties interested although not made parties have filed briefs, and desire the case to be determined on the merits, we proceed to consider the case, first mentioning the irregularities.

The petition is brought by Charles Bassett, as administrator *de bonis non* with the will annexed of Clement Kendrick against the executor of the will of Sarah A. K. Turner, who was the residuary devisee and legatee of Clement Kendrick, and who left a will disposing of all her property. The principal question in the case is whether Turner took an estate in fee in the real estate and an absolute estate in the personal property, or whether she took only an estate for life with a power of disposal during her life, but without a power of disposal by will. It is obvious in such a case that the petitioner had nothing to do with the real estate unless it was needed for the payment of debts, *Hall* v. *Cogswell*, 183 Mass. 521, and there is no allegation of this, nor did the executor of the will of Turner, the only respondent named, have anything to do with the real estate, unless needed for the payment of debts. There is also a statement of facts in the case signed by the petitioner and the respondent, but whether this was filed in the Probate Court or in the Supreme Judicial Court does not appear.

The case was reserved for our consideration on the agreed facts, and it does not appear that either the heirs at law of Kendrick or the legatees and devisees under the will of Turner have been made parties. We proceed to consider the case as if the proper parties were before us, as they have appeared and filed briefs.

By the first two clauses of the will of Clement Kendrick,

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dated September 27, 1882, he left to his two brothers John C. and Zemira, $500 each.

The third clause of his will reads as follows: "I give, devise and bequeath to my niece, Sarah A. K. Turner my present housekeeper, all the rest and residue of my estates, both real and personal that I may die possessed of, after paying the above named legacies and my funeral expenses and all other debts that I may be owing at my decease (if any) and after the payment of the above named debts and legacies I hereby give her, my said niece, Sarah A. K. Turner full power to do with the remainder of my said estates as she may deem most proper during her natural life."

The fourth clause of the will appointed Sarah A. K. Turner executrix of the will.

The first codicil to the will was dated June 1, 1891. In it after describing himself as of Chatham, was the following language: "I give and bequeath to the treasurer of the Peoples' Cemetery in said Chatham and to his successors in said office the sum of five hundred dollars, in trust nevertheless (providing there should be so much remaining or whatever there might be remaining at the decease of my niece Sarah A. K. Turner and the payment of all her funeral and legal expenses are paid) to be by said treasurer safely invested and so much of the interest thereof as may be necessary therefor to keep my father's, Josiah Kendrick, my brothers, John C. Kendrick, Henry Kendrick and my own burying lots in said cemetery in good order forever; and if the said interest should be more than is necessary for that purpose, the balance of interest may be used to be put into a fund to be used for the repairs of the fence around said cemetery. Hereby ratifying and confirming my said will as aforesaid except as the same may be altered or changed by this my said codicil thereto."

The second codicil dated August 8, 1894, gave one dollar to the heirs of his deceased brother Tracy, and the same amount to the heirs of his deceased brother Josiah. To his brother John C. if he outlived the testator he left the sum of $100, and expressly cancelled the bequest of $500 made in the will. The same amount was bequeathed to Zemira on the same conditions and the bequest of $500 in the will, was expressly cancelled.

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Clement Kendrick died on November 26, 1894. At the time of making his will and at his death his heirs at law were brothers and heirs of deceased brothers. Sarah A. K. Turner was a niece of the testator's wife and not a relation of the testator. She was appointed executrix of the will January 8, 1895. She filed an inventory showing personal estate to the amount of $5,434, and real estate, including the homestead, to the amount of $1,475. In her probate accounts she transferred to herself all the remaining personal estate, after the payment of the testator's bills, and the expenses of administration.

Sarah A. K. Turner died May 8, 1901, leaving a will and codicil, which were duly admitted to probate, and the respondent was appointed the executor of her will. The inventory of her estate shows personal estate to the value of $8,642, and real estate to the value of $2,000. This inventory includes all the property or the proceeds thereof which the testatrix had before transferred to herself from the estate of Clement Kendrick.

The judge of the Probate Court made a decree that Sarah A. K. Turner took a life estate in the residue of the testator's property, with a power to manage the life estate and to expend in her lifetime, for her own use and benefit, so much of the principal as she should deem proper, and that no power to dispose of the property by will was given to Sarah A. K. Turner; that $500 was the maximum amount given in the codicil to the treasurer of the Peoples' Cemetery, and that the words "whatever be remaining" referred to a sum less than $500; and that the heirs at law of Clement Kendrick, living at the time of his decease, were entitled to the residue of his property not expended by Sarah A. K. Turner, after payment of the legacies named in the first and second codicils, and the further payment of the funeral and legal expenses of Sarah A. K. Turner. The decree further ordered that the respondent Nickerson, as executor, turn over and deliver to Bassett, as administrator, all the rest and residue of the real and personal estate of Clement Kendrick which was in the hands of his testatrix, Sarah A. K. Turner at the time of her decease.

It seems to us very clear that the heirs at law and next of kin of Clement Kendrick, are entitled to take nothing which is not

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expressly given to them by the will as modified by the second codicil. The testator evidently did not intend to die intestate as to any of his property.

Nor can we doubt that under the third clause in the will Turner took a fee in the real estate and an absolute right in the personal property; and that the power to dispose of the property given her during her life, was simply an attempt to add something to that which was already complete. Unless there is a difference between a devise containing words of inheritance and a devise without these words, the case is governed by *Damrell* v. *Hartt*, 137 Mass. 218. In that case a man devised land to his son "to have and to hold the same to him, his heirs and assigns forever; and if he shall die not having disposed of the same" then over. It was held that his son took an absolute estate. See also *Briggs* v. *Shaw*, 9 Allen, 516; *Joslin* v. *Rhoades*, 150 Mass. 301.

We consider it as well settled in this Commonwealth that words of inheritance have never been considered as necessary to pass a fee in a will. As long ago as 1651, there was a colony law providing that in deeds and conveyances of houses and lands wherein an estate of inheritance was to be passed, the words "his heirs and assigns forever" should be included, but there was a proviso "that this law shall not extend to houses or lands given by will or testament." 3 Mass. Col. Rec. 222. Anc. Chart. 85. Col. Laws (Whitm. ed.) 32. Whether this law remained in force after the adoption of the Constitution of this Commonwealth, by reason of c. 6, art. 6, is unnecessary to consider, because the will and codicils were made while the Public Statutes were in force. By c. 127, § 24, it is provided: "Every devise shall be construed to convey all the estate which the testator could lawfully devise in the lands mentioned, unless it clearly appears by the will that he intended to convey a less estate." See also R. L. c. 135, § 22. The section in question first appears in the form of law in the Rev. Sts. c. 62, § 4, in this form: "Every devise of land, in any will hereafter made, shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall clearly appear by the will, that the devisor intended to convey a less estate." It first appears as an amendment adopted by the com-

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mittees on the report of the commissioners on the Revised Statutes, p. 85.

The rule of law adopted as to the construction of wills made before the Revised Statutes took effect, was that the intention of the testator was to govern, if such intention could be carried into effect consistently with the rules of law, but words of limitation were not considered necessary. *Richardson* v. *Noyes*, 2 Mass. 56. The fact that there is no devise over is an indication that the testator did intend to give a fee. *Baker* v. *Bridge*, 12 Pick. 27, 31. In *Godfrey* v. *Humphrey*, 18 Pick. 537, the language was: "I do give and bequeath to my wife Sarah Thayer, all my real and personal estate of every description, she paying my just debts and legacies." This was held to pass an estate in fee.

In *Parker* v. *Parker*, 5 Met. 134, 138, it is said by Shaw, C. J.: "In the first place, it is apparent, that in the principal devise to the sons, there are no words of limitation; that is, it is not in terms devised to them and their heirs. But as it is a will, and not a deed, which we are considering, we are inclined to the opinion, that if it stood upon that clause alone, it would be sufficient to create an estate in fee simple, without words of limitation — for two reasons; first, because it is a devise of all his real estate; and secondly, because, by another clause in the will, he charges these devisees personally, with the payment of a considerable sum of money to their sisters; which circumstances are regarded, for well known reasons as legal *indicia* of an intent to give an estate in fee. 18 Pick. 537. 8 T. R. 1."

In *Plimpton* v. *Plimpton*, 12 Cush. 458, the testator, by a will made before the Revised Statutes took effect, gave to his wife the "improvement" of his dwelling house during her life, and after his wife's decease he gave the dwelling house to his son. It was held that the son took a fee, notwithstanding there were no words of limitation. See also *Leland* v. *Adams*, 9 Gray, 171.

It thus appears that down to the passage of the Revised Statutes, a fee would pass without words of limitation, and that it made no difference whether these words were contained in the will or not. The statute in question was meant to be a rule of construction. Its language is: "Every devise of land, in any will hereafter made, shall be construed to convey all the estate

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of the devisor therein, which he could lawfully devise, unless it shall clearly appear by the will, that the devisor intended to convey a less estate."

It is evident that the statute did not intend to apply a stricter rule than had been applied before, or to make words of limitation necessary. See *Gleason* v. *Fayerweather*, 4 Gray, 348, 350.

In *Willcut* v. *Calnan*, 98 Mass. 75, eight articles of a will made specific devises of land, with the words "to have and to hold the same to him, his heirs and assigns." The sixth article gave, bequeathed and devised a parcel of land, without these words of inheritance. There was a residuary clause to the testator's widow. It was held that the devisee under the sixth clause took a fee.

There is also a class of cases like the case at bar where the testator has given, without words of limitation, all the rest and residue of his estate, and has either given a power to dispose of the same by will or during life, and there has been no remainder over. In these cases it has been held that the residuary devisee took a fee. *Spooner* v. *Lovejoy*, 108 Mass. 529. *Todd* v. *Sawyer*, 147 Mass. 570. *Veeder* v. *Meader*, 157 Mass. 413. See also *Lloyd* v. *Lloyd*, 178 Mass. 97.

We of course concede that where there is a gift or devise to A. for life with a power of disposition either during life or by a will, with a remainder over, A. takes only an estate for life, coupled with a power, which if not exercised gives effect to the remainder. *Collins* v. *Wickwire*, 162 Mass. 143.

If the conclusion we have reached is correct that Turner took a fee under the will, the question remains as to the effect of the codicil. The codicil is to be read with the will as if it formed a part thereof, both speaking the language of the testator at the time of his death. *Gray* v. *Sherman*, 5 Allen, 198, 199. *Richardson* v. *Willis*, 168 Mass. 180. *Kelley* v. *Meins*, 185 Mass. 231.

We do not doubt the power of a testator to change his will in any way that he may see fit. But to accomplish his purpose he must use apt words, and must comply with the rules of law. If he had simply left $500 to the treasurer of the cemetery corporation, in trust, etc., this well might be considered a legacy

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added to his will. But he did not do this. Having given a fee in all his remaining property to Turner, he assumed to exercise control over what she might leave. Such attempts are very common, but have never yet been successful, either by will or codicil. The rule was laid down as early as 1809, in this Commonwealth, and has never been departed from. *Ide* v. *Ide*, 5 Mass. 500. This was a case of a devise of real estate, where a fee was given to A. and a devise was made to B. in the same will of what A. should leave. The same rule applies to personal estates. In *Merrill* v. *Emery*, 10 Pick. 507, a testator left to his wife one half of all the money he might leave in the house and one half of all the family stores, at that time on hand; and that one granddaughter should have all the family stores his wife should leave, and that the money remaining in the house at his wife's decease should be divided among his grandchildren. It was held that the gift to the wife being absolute, the limitation over was void. See also for other cases where the attempt is made in the same instrument, *Burbank* v. *Whitney*, 24 Pick. 146; *Damrell* v. *Hartt*, 137 Mass. 218; *Sherburne* v. *Sischo*, 143 Mass. 439; *Joslin* v. *Rhoades*, 150 Mass. 301; *Foster* v. *Smith*, 156 Mass. 379; *Hunting* v. *Damon*, 160 Mass. 441.

In *Knight* v. *Knight*, 162 Mass. 460, the testator after disposing of six sevenths of the residue of his estate used the following language: "And the other one seventh part I give and devise to my said wife, to be disposed of as she shall think best, but if any part of her said seventh part shall not be disposed of at the time of her decease, then the part of her seventh part remaining undisposed of at her decease shall be equally divided among my said six children." It was held that the widow took the absolute property in the one seventh of the residue of her husband's estate, and not a life estate with power of disposal during her lifetime.

The case of *Kelley* v. *Meins*, 135 Mass. 231, is precisely in point in this case. There the testatrix devised all her property real and personal to her son. The first codicil provided that if her son should die without leaving living issue "then any portion of my said estate and property which may remain shall be equally divided among my sisters and nieces and their female heirs and assigns." It was held that the first codicil, so far as it

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attempted to cut down to a life estate what was given absolutely by the will, was void, though it was admitted that had apt words been used in the codicil the result would have been different.

A majority of the court is of opinion that Turner took a fee in the real estate, and an absolute title in the personal property; and that the first codicil is of no effect. The decree of the Probate Court must be reversed, and a decree entered in accordance with this opinion.

So ordered.

PORTE W. HEWINS & another *vs.* LONDON ASSURANCE CORPORATION.

SAME *vs.* WILLIAMSBURG CITY FIRE INSURANCE COMPANY.

SAME *vs.* CONTINENTAL INSURANCE COMPANY.

SAME *vs.* SUN INSURANCE OFFICE.

SAME *vs.* QUEEN INSURANCE COMPANY OF AMERICA.

SAME *vs.* HARTFORD FIRE INSURANCE COMPANY.

SAME *vs.* FIRE ASSOCIATION OF PHILADELPHIA.

SAME *vs.* HOLYOKE MUTUAL FIRE INSURANCE COMPANY.

SAME *vs.* DORCHESTER MUTUAL FIRE INSURANCE COMPANY.

SAME *vs.* MERCHANTS AND FARMERS MUTUAL FIRE INSURANCE COMPANY.

SAME *vs.* TRADERS AND MECHANICS MUTUAL INSURANCE COMPANY.

SAME *vs.* PAWTUCKET MUTUAL FIRE INSURANCE COMPANY.

Suffolk. March 10, 1903. — September 16, 1903.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Insurance, Fire.

In determining the amount of a partial loss by fire under a policy in the Massachusetts standard form, issued after the enactment of the building laws of Boston, on a building in that city erected before those laws were passed, the increased cost of repairing the building by reason of the building laws may be considered.

The provision in the Massachusetts standard form of fire insurance policy that in case of a partial loss the insurer may "replace the property with other of the same kind and goodness," in a policy issued on a building in Boston after the

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enactment of the building laws of that city, must be held to apply only to repairs in which replacement with materials of the same kind and goodness would be lawful.

A policy issued by a foreign fire insurance company, on a building in Boston erected before the enactment of the building laws of that city, provided that the loss or damage should in no event exceed what it would cost the insured to repair or replace the property with material of like kind and quality, and also provided that the insurer should not be liable beyond the actual value destroyed by fire for loss occasioned by ordinance or law regulating construction or repair of buildings. The building laws were in force when the policy was issued. *Held*, that in determining the amount of a partial loss by fire under this policy, the loss was to be estimated as if there were no building laws.

The provision of St. 1894, c. 522, § 60, that no fire insurance company shall issue policies on property in this Commonwealth, other than those in the standard form, except as therein provided, and § 105 of the same statute, imposing a fine for issuing a policy in violation of § 60, and providing that the policy shall nevertheless be binding upon the company issuing it, do not change the legal effect of a policy issued in violation of the statute, and a policy so issued must be construed as it reads and not as if it were in the standard form.

TWELVE ACTIONS OF CONTRACT by the same plaintiffs against different fire insurance companies on twelve several policies, eleven of them in the Massachusetts standard form and the twelfth in the Rhode Island standard form, each action for a balance alleged to be due upon a partial loss by fire of the Advertiser Building on Washington Street in Boston. Writs dated September 11, 1901.

In the Superior Court the cases were heard by *Richardson*, J., without a jury. He found the facts to be as stated in an agreed statement of facts filed in the case, and on those facts found for the defendant in each case. By agreement and at the request of the parties he reported the cases for determination by this court.

The fire occurred on March 15, 1901. The policies were issued on or about February 1, 1899. The building laws of Boston, St. 1892, c. 419, St. 1894, c. 443, were passed after the erection of the building. The amount of the loss was referred to three disinterested referees under the terms of the policies, with the agreement that they should find what sum would be an indemnity to the assured in the absence of the building laws, and another sum which would be an indemnity if the building laws were to be considered in their finding, that the smaller sum should be paid to the assured within sixty days, and that the plaintiffs should bring actions for the difference.

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On May 1, 1901, the referees made the following award: "We award $30,610 as indemnity to the assured in case we have no right as a matter of law to consider said building laws. But if we have a right as a matter of law to consider said building laws, we award $45,792." The smaller sum was paid to the plaintiffs by the insurance companies, and the plaintiffs brought these actions for the balance.

It was agreed, that if the referees had the right in determining the amount of damages to which the plaintiffs were entitled to take into consideration the increased cost of repairing the building by reason of the building laws, judgments were to be entered for the plaintiffs against the several defendants for the amounts respectively declared on, with interest from May 1, 1901; otherwise judgments were to be entered for the defendants.

A. Hemenway, for the plaintiffs.

S. J. Elder & R. F. Herrick, for the defendants.

HAMMOND, J. In these twelve cases the question is whether the referees, in determining the amount of damages to which the plaintiffs were entitled, "had the right to take into consideration the increased cost of repairing the building by reason of the building laws."

In each case the question calls for the construction of the contract of insurance. It is plain, to begin with, that the contract does not cover all the loss suffered by the insured by reason of the fire, such as interruption of business, loss of profits or even loss of rents. Nor is the insurer bound to repair, although for obvious reasons it has the option to do so. The contract simply insures the plaintiffs "against loss or damage by fire" to the building with its appurtenances and fixtures. It is a contract of indemnity. Ordinarily the loss or damage by fire is the difference between the value of the building before the fire and the value of what remains after the fire, and that difference is to be regarded as the true loss covered by the policy unless there be in the policy some language by which some element of that difference is excluded. Where the building is only partially destroyed and the proper course is to repair, as in the cases before us, it is manifest that in estimating the value of the part remaining the cost of the necessary repairs is a very material matter; and, if the repairs must conform to certain legal requirements, the

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nature of those requirements is also to be considered. In considering the cost of repairs it would not be profitable to think of repairs which the law forbids, but only of those which the law does not forbid. This rule of estimating the damage to real estate by reason of some injurious change is of very general application. A familiar illustration is to be found in suits for damages for land injured in the exercise of the right of eminent domain.

It may happen that after being repaired a building is of greater value than before the fire, and in marine insurance there is a rule of quite general application by which an allowance is made to the insurer on that account; but in the present cases we have no occasion to inquire whether any such allowance should be made because the only question raised upon the report and submitted to us is whether "the referees had the right, in determining the amount of damages to which the plaintiffs were entitled, to take into consideration the increased cost of repairing by reason of the building laws." If they had that right the sum is agreed upon.

It therefore becomes necessary to look into the policies and see whether they contain anything which is inconsistent with this method of estimating the loss. With the exception of the policy issued by the Pawtucket Mutual Fire Insurance Company, which is reserved for separate consideration, they are all of the form known as the Massachusetts standard, and each contains the following provision: "In case of any loss or damage, the company . . . shall either pay the amount for which it shall be liable, which amount, if not agreed upon, shall be ascertained by award of referees as hereinafter provided, or replace the property with other of the same kind and goodness, or it may . . . notify the insured of its intention to rebuild or repair the premises." Three courses are open to the company. It may pay in cash, may replace the property with other of the same kind and goodness, or may make the repairs. Neither defendant has chosen to repair. It is to be noted that there has been no change in the building laws since the policies were issued, and that fact must be borne in mind in construing them. They cover not only the building, but also the "additions, including plate glass, fresco work, piping of all kinds, plumbing, engines, boilers, connections and

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all appurtenances to same," machinery, fixtures and "sidewalks adjacent." It is obvious that there were many ways in which the insured property might have been damaged by fire where there could have been lawful replacement or repair with property of the same kind and goodness. It is not to be presumed that the parties intended to contract for the doing of that which could not lawfully be done. Inasmuch as at the time the contracts were made two kinds of loss by fire might have been reasonably apprehended, one where the law would permit such repair or replacement, and the other where it would not, the clause must be regarded as intended to apply only to the first class of cases. It can have no application to the class where its application would be legally impossible. Hence it can have no bearing even as to the method in which the amount to be paid in cash should be ascertained so far as respects the second class. We find nothing else in the policies which needs to be considered on this point. The result is that there is nothing in the policies to change the general rule that, where a building is partially destroyed by fire, the loss is the difference between the value of the building before the fire and the value of the part remaining after the fire.

The referees, however, have reported that, if the building laws were not to be considered, $30,610 would be full indemnity to the assured, but, if they are to be considered, then the sum should be $45,792; and it is strenuously contended by the defendants that the difference between these two sums is a loss attributable not to the fire, but to the building laws; that it is not covered by the policy, and that the cost of restoring the building to its original condition is the true measure of the risk assumed by them.

This position seems to us untenable. The building laws were the same at the time of the fire as at the time the policies were issued. The only change in the situation was in the physical condition of the building, and that change was caused wholly by the fire. The building laws simply constituted one of the conditions of the situation. While it is true that by reason of their existence the loss caused by the ravages of the fire was greater than it otherwise would have been, it is none the less true that the sole operating cause of the change in the building was the

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fire, and as above stated in the absence of any provision in the policy expressly excluding from the damages the part arising out of that condition, that part is not to be excluded, but is to be regarded as primarily the result of the fire, or as "loss or damage by fire." In *Brady* v. *Northwestern Ins. Co.* 11 Mich. 425, it was held that where an ordinance prevented the repair of a building which had been partially destroyed by fire the loss was total, although the cost of restoring the building to its original condition would have been much less than the amount of insurance. The case seems to have been elaborately argued, and the reasoning of the court by which the decision was supported seems to us to be sound. The same principle has been recognized in other jurisdictions. *Monteleone* v. *Royal Ins. Co.* 47 La. Ann. 1563. *Hamburg-Bremen Ins. Co.* v. *Garlington*, 66 Tex. 103. *Larkin* v. *Glens Falls Ins. Co.* 80 Minn. 527. These cases support the general proposition that where the law prohibits the repair of a building which has been partially destroyed by fire, in the absence of any express provision in the policy to the contrary, the loss is not measured by the sum required to restore the building to its condition before the fire, but it is total, less the value of the remaining materials for removal. Since the change in the building is caused solely by the fire, the difference in its value caused by that change is loss or damage by fire within the meaning of the policy, in the absence of anything therein to the contrary. The principle is the same whether its application results in a total loss, or in an increase of a partial loss, as in *Pennsylvania Co. for Insurance* v. *Philadelphia Contributionship*, 201 Penn. St. 497. It follows that in each of the cases except that against the Pawtucket Mutual Fire Insurance Company judgment is to be entered for the plaintiffs in accordance with the terms of the report.

The policy issued by the Pawtucket Mutual Fire Insurance Company is materially different from the other policies. It provides that in case of loss the loss or damage "shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality." There is also a provision that the insurer shall not be liable "beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by inter-

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ruption of business, manufacturing processes or otherwise." The first is a specific clause expressly declaring that in no event shall the sum to be paid in cash exceed the cost of restoring the property to its original condition. The second clause specifically names the building laws. We think that these two clauses mutually strengthen each other, and that when construed together they modify the general rule as to the measure of the loss by fire in such a case as this, and that the fair construction of these two clauses taken together is that such portion of the damage caused by the change in the condition of the building as arises from the existence of the building laws, whether regarded as a condition or a cause, is not to be considered as a loss or damage by fire, but is to be excluded from consideration, and the loss is to be estimated as if there were no building laws affecting the situation.

It is urged by the plaintiffs that, this policy being different from the standard prescribed by our statutes and the difference not being indicated thereon as required by law, the differences are null and void and the policy is to be construed as though it were conformable to the standard; and in support of that proposition they have cited cases like *Queen Ins. Co.* v. *Leslie*, 47 Ohio St. 409, in which it is held that where a statute provides a certain rule for the interpretation of a policy the statute must be regarded as incorporated in the policy issued when the law is in force, and being so incorporated must prevail over such other provisions as are inconsistent with it. But such cases are not applicable here. The statute in force when this policy was issued did not provide how the policy should be interpreted. It provided, it is true, a standard form, stated in what way and to what extent the form might be modified, declared that no company should issue a different policy and that if it did it should be subject to a fine, but also declared that the policy should be binding upon the company. St. 1894, c. 522, §§ 60, 105. It does not provide any rule of interpretation of a policy issued contrary to law, nor does it say that the policy shall be void. On the contrary it fines the company for issuing the policy and declares it to be binding upon the company. Its legal effect is not changed. The illegal policy is not changed by law so as to conform to the legal standard. The insured may sue upon it, but it must be

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construed as it reads. No statute is incorporated in it. The penalty suffered by the company is a fine, and not a liability to be held on a contract different from that made by it. It follows therefore that as to this one policy the amount recovered cannot exceed its part of the sum equal to an amount needed to restore the building to its original condition, and in this case judgment should be entered for the defendant. As to the other cases judgments should be entered for the plaintiffs in accordance with the report, and it is

So ordered.

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HERBERT A. CHAPIN *vs.* MARY S. PIKE, administratrix, & another, trustee.

Middlesex. March 16, 1903. — September 17, 1903.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Assignment.

When a contract to do work for a city is assigned as a whole after a part performance, the assignment includes all sums due for work previously done under the contract which have been retained by the city to ensure performance

CONTRACT, on a judgment, against the administratrix of the surviving partner of the firm of Henry H. Pike and Son, the city of Waltham being summoned as trustee. Writ dated June 21, 1897.

The defendant was defaulted. The Superior Court made an order discharging the trustee, and the plaintiff appealed. One Benshimol mentioned by the court appeared as claimant.

H. H. Winslow, for the plaintiff.

J. L. Harvey, (*R. M. Stark* with him,) for the trustee.

M. M. Johnson, for the claimant.

LORING, J. This is an action brought by a creditor of the firm of H. H. Pike and Son to reach and apply in payment of a debt due from them the sum of $2,008.60, which has been found to be due under a contract between the city of Waltham and said firm of H. H. Pike and Son. This sum of $2,008.60 was found to be due in an action brought in the name of Pike against the city,

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which was before this court in *Pike* v. *Waltham*, 168 Mass. 581. The facts found in *Pike* v. *Waltham*, 168 Mass. 581, were not fully disclosed in the case at bar. More than that, the case at bar has to be disposed of on the meagre facts as to the claimant's rights disclosed in the answer of the trustee. The record before us does not contain a claim made by the claimant which would have raised an issue of fact between him and the plaintiff. In the absence of such a claim, the question which arises is whether, on the facts disclosed in the answer of the trustee, the fund is due to the claimant. If it is he must be discharged. *Fuller* v. *Storer*, 111 Mass. 281, 282. *Taylor* v. *Collins*, 5 Gray, 50, note. *Richards* v. *Stephenson*, 99 Mass. 311.

From the answer of the trustee in this action it appears that in May, 1888, Pike and Son made a contract with the city of Waltham for the construction of a bridge, and that one Benshimol went surety on their bond for the performance of the work. It is stated in the answer of the trustee that it is "claimed" that Benshimol "carried the work forward and furnished materials after the death of" one partner and the physical disability of the other, and until the surviving partner was ordered to cease work by a written notice from the city. Apparently the Pikes ceased work on October 5, 1888, and more or less work was done by Benshimol until March 25, 1889, when the construction was taken out of the hands of the contractors under the contract by written notice and the work of completing the bridge was relet on April 15, 1889, to another contractor. On November 19, 1888, the surviving partner of H. H. Pike and Son made the following assignment to Benshimol: "Know all men that I, Henry H. Pike surviving partner of the firm of H. H. Pike & Son, lately consisting of myself and Henry E. Pike who has deceased, for valuable considerations proceeding to me from Joshua Benshimol, do hereby assign, transfer and set over unto said Benshimol the contract made in May, 1888, between said firm and the city of Waltham for the construction of the Prospect Street Bridge in said Waltham."

It appears that by the terms of the original contract between Pike and Son and the city, payments were to be made monthly on account of work done, fifteen per cent of the amount due therefor being retained until completion of the whole work.

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The amount retained out of money due for work done prior to October 1, 1888, was $1,590.90, and the amount retained out of money due for work done after October 1 until the work was taken out of the hands of the contractors was $1,048.99. How the finding was arrived at that $2,008.60 is the amount due under the contract does not appear. But as it is less than the two sums mentioned above retained out of the monthly payments otherwise due, it is apparent that the whole $2,008.60 is made up of sums so retained. It appears that the amount retained at the date of the assignment was $1,686.57. The question presented is whether the assignment of the contract carries all sums due for work previously done under it but retained until completion to insure performance.

The plaintiff argues that it does not, because an assignment of money due under a contract is not an assignment of the contract, and cites *Segee* v. *Downes*, 143 Mass. 240, 241; *Staples* v. *Somerville*, 176 Mass. 237; *Somers* v. *Keliher*, 115 Mass. 165. The other case relied on by the plaintiff is a case where it was held that there was no assignment either of the contract or of money due under it. *Keefe* v. *Flynn*, 116 Mass. 563.

Of course that is true; of course it is true that an assignment of what is due or is to become due under a contract is not an assignment of both the duty of performing the contract and receiving payment therefor. By the very terms of that assignment the benefit of the payment is separated from the burden of performance. But where the contract as a whole is assigned there is no separation between the benefits and burdens. A contract is a single entity; and if it is assigned as an entity and the contract is fully executed except the payment of certain money earned under the contract, the assignee is entitled to it.

Order discharging trustee affirmed.

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JACOB FOTERNICK & another *vs.* PAUL B. WATSON.

Suffolk. March 17, 18, 1903. — October 19, 1903.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Contract, Performance and breach, Construction.

In an action for the breach of an executory contract in writing in which no day of performance is named, the plaintiff, if he was not in default and was ready to perform, may recover without showing performance on his part, if he shows that the defendant left the Commonwealth in order to evade a tender of performance, or that the defendant wholly had repudiated the contract.

In an action for an alleged breach of an agreement in writing, it appeared, that the plaintiff, a builder, wishing to purchase a parcel of land on which was a mortgage for $10,800 and to build on it certain houses, applied to the defendant for a construction loan, that the defendant agreed to lend the plaintiff $36,000 on the houses to be erected, $20,000 when the houses, except the front walls, were built to the second floor, and the remaining $16,000 in instalments as the houses reached specified stages of completion, and the plaintiff agreed to build forthwith the houses on the land, and to give the defendant forthwith "a mortgage on said land which shall be a first mortgage when the first payment is called for", except that the defendant "may, if he desires, allow the present first mortgage of $10,800 with interest at four per cent per annum to remain on the land, provided he will assume same and pay interest thereon from date of first payment to us, which shall then be $9,200." The plaintiff purchased the land subject to the mortgage named, giving a second mortgage of $7,800 for the purchase money. He then gave to the defendant a mortgage for $36,000 on the property, and constructed the houses to the stage required for the first payment, when the alleged breach of the contract by the defendant occurred. *Held*, that the parties contemplated the payment of the pre-existing mortgages out of the first payment of $20,000 by the defendant, and that the plaintiff was entitled to look to that payment to make the mortgage for $36,000 a first mortgage.

CONTRACT for alleged breach of a contract in writing. Writ dated November 4, 1899.

In the Superior Court *Stevens*, J. made the ruling stated in the opinion. The jury returned a verdict for the defendant; and the plaintiffs alleged exceptions.

A. Bon, for the plaintiffs.

R. Homans, (*S. L. Whipple* with him,) for the defendant.

LORING, J. In this case the jury were warranted in finding the following facts: The plaintiff Fotenick is a builder by

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trade. He wished to construct some houses on a parcel of land on which there was a mortgage for $10,800. Before buying the land or otherwise entering upon the undertaking he applied to the defendant for what is generally known as a construction loan, and on April 13, 1899, Foternick and the plaintiff Lavinsky, in whose name Foternick proposed to take title as a matter of convenience, entered into a written contract with the defendant, whereby the defendant agreed to lend the plaintiffs $36,000 "on first mortgage on five brick houses hereinafter described, to be erected" on the parcel of land in question, "as follows: $20,000 when cellars and brick walls, except front walls, are completed to level of second floor and second floor is on," and the remaining $16,000 in specified instalments as the houses reached specified stages of completion; and the plaintiffs agreed to build on said land forthwith five brick houses as there described, and also "to give said Watson forthwith a mortgage on said land which shall be a first mortgage when the first payment is called for, except that said Watson may, if he desires, allow the present first mortgage of ten thousand eight hundred dollars with interest at four per cent per annum to remain on the land, provided he will assume same and pay interest thereon from date of first payment to us, which shall then be nine thousand two hundred dollars; said mortgage to Watson shall precede all labor on the premises and all contracts for labor and material, of which fact we agree to give said Watson satisfactory evidence when the first payment is called for." The $36,000 was to be repaid in six months from April 13, with interest on the whole $36,000 at the rate of twelve per cent per annum from April 13. The defendant, who is a lawyer, was employed by the plaintiffs to examine the title. One half the lot was conveyed to the plaintiff Lavinsky on April 26, and the other half on June 7, both conveyances being subject to the mortgage for $10,800. The purchase money was $7,800, for which mortgages were given back, one on April 26 and the other on June 7, and what were then third mortgages conditioned for the payment of $36,000 were executed at the same time to the defendant, to wit, on April 26 and June 7. Although there were two mortgages conditioned to pay $7,800 and two mortgages for $36,000, there was but one sum of $7,800 and one sum of $36,000 to be paid.

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The plaintiff Foternick began work immediately after June 7, when he first got title to the whole interest in the premises.

The jury would also have been warranted in finding that on Monday, August 7, or Tuesday, August 8, the construction of the five brick houses had so far progressed that the second floors were on, and the plaintiff Foternick went to the defendant's office and told him that he was ready or would be ready in a few days for the first payment, and asked the defendant to come out and inspect the buildings; and that the defendant promised to do so on the following Thursday or Friday at the latest. There was also evidence that the plaintiff Foternick waited at the buildings for the defendant on Thursday and on Friday until after the hour of the day had passed at which the defendant had been in the habit of visiting the buildings when he had been there before; and thereupon the plaintiff Foternick went to the defendant's office and was told that the defendant had gone on his vacation. The plaintiff Foternick then went to his own office and found the following letter from the defendant, dated August 10: "Dear Sir, — I have received notice from the Building Commissioner that complaint has been made by the Inspector against your buildings at the corner of Columbus Av. & Davenport St., on which I hold mortgage. I am not willing to make loans on buildings that are not satisfactory to the Inspector. As you may perhaps wish to place the loan with others who do not make this stipulation in their contracts, I have this day discharged my mortgages on the property." He also found a letter signed by the inspector of buildings notifying him "that a violation of Chapter 419 of the Acts of 1892 exists, to wit, Sect. 33 — Light hard brick used for outside work," and that he was required "to remove said violation at once." It appeared that the inspector assigned to the plaintiffs' buildings by the building commissioner was one Follansbee. The plaintiff Foternick called at the building department to see Follansbee on Friday, August 11, and on Monday, August 14, and on the second day found that Follansbee also had gone away on his vacation. He then was referred at the building department to a Captain Barry, who was a supervisor of construction to whom an appeal lay from Follansbee's decision. On Wednesday, August 16, Captain Barry inspected the buildings. Captain

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Barry was called as a witness by the plaintiffs. He testified that on August 16 he found that there were in fact no light hard bricks in the houses and that there was no violation of the law; and "closed" the complaint and indorsed a statement to that effect on the notice to the plaintiffs. He further testified that his decision was final unless an appeal was taken from it to the building commissioner, and in this case there was no appeal; and that by the practice of the building department the notice of violation is sent out on the report of the inspector, by filling in a blank signed in advance by the building commissioner. It also appeared that Follansbee in the following May indorsed on his original report as to the violation "that the complaint has been removed. Cost $15." But there was no evidence that any of the brick which was in the buildings in August had ever been removed. There was evidence that what was meant by "Cost $15," was that the removing of the brick which he reported was a violation of the building act and substituting proper brick would have cost $15.

It also appeared that the mortgages for $36,000 were in fact discharged by the defendant by a release executed August 10, 1899, and put on record in the registry of deeds by the defendant on that day.

There was evidence that the plaintiff Foternick, on learning that the defendant had gone away, tried to get the money necessary to carry him through from other persons, and failing to do so lost all the money he had put into the undertaking, by a foreclosure of the mortgages for $7,800 on September 13. These mortgages became due on May 13. The defendant went away on his vacation August 11, and was away "about" a month.

After the plaintiffs had rested, and while the defendant was putting in his evidence and before he had rested, the defendant requested the presiding judge to rule that by the true construction of the clause of the contract requiring the mortgage for $36,000 to be a first mortgage "when the first payment is called for," the plaintiffs were not entitled to any part of the $36,000 in order to pay off the prior mortgages of $10,800 and $7,800, or either of them, but had to make the $36,000 mortgage a first mortgage when they called for the $36,000 and before the defendant was bound to pay over any part of the $36,000, and

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as there was no evidence that the first mortgage for $10,800 and the second mortgage for $7,800, or either of them, had been discharged before this action was begun, the plaintiffs could not recover. The judge so ruled, and then directed the jury on all the evidence to return a verdict for the defendant, to which the plaintiffs excepted.

In ruling that the plaintiffs had not made out a case because the $7,800 mortgage had not been discharged before the date of the writ the presiding judge seems to have disposed of the case on the footing that the plaintiff Foternick had called for the $20,000 and not on the footing that he notified the defendant that he should call for it in a few days. The jury were warranted in finding the latter to be the fact. If they did so find, the plaintiffs would have made out their case without showing performance by them in making the mortgage for $36,000 a first mortgage, on showing that the conduct of the defendant had excused them from performing their part of the contract. In this view of the case the construction of the contract does not seem to be material.

We are of opinion that the plaintiffs had a right to go to the jury on the ground that the decision made by Follansbee, acting for the building commissioner, that there was a violation of St. 1892, c. 419, in using light hard brick, was reversed on appeal, and that the defendant had gone out of the Commonwealth to evade a tender under the contract and thereby the plaintiffs were excused from notifying the defendant of the fact that Follansbee's decision had been reversed, and from tendering performance.

We assume for the purposes of this discussion that the decision of the building department on the question of fact is final, although no reference has been made to any statute making it so.

There was evidence that the defect, if there was one, could be cured at an expense of $15, and the fact that the defendant saw Follansbee about the matter twice between Monday, August 7, and Friday, August 11, warranted the jury in finding that he knew the character of the defect. The fact that the defendant knew that the defect was one which, if it existed at all, could be cured at this trifling expense, taken in connection with the

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defendant's own testimony that before many months had passed he suspected that there was fraud on the part of the plaintiffs and did not suppose that the building was ever to be completed or anything further to be done about it, and in connection with the other circumstances in evidence, warranted the jury in finding that the defendant left the Commonwealth to evade having a tender of performance made upon him. The case comes within *Gilmore* v. *Holt*, 4 Pick. 258, *Tasker* v. *Bartlett*, 5 Cush. 359, *Southworth* v. *Smith*, 7 Cush. 391.

It is not necessary to decide whether the action of the defendant was not such a total repudiation of the agreement even without a finding that he left the Commonwealth to evade a tender as to excuse further performance on the part of the plaintiffs. It is true, as argued by the defendant, that when one party to a contract relies on a repudiation as excusing him from making an offer to perform, the repudiation must be absolute. *Carpenter* v. *Holcomb*, 105 Mass. 280. *Wells* v. *Day*, 124 Mass. 38. *Galvin* v. *Collins*, 128 Mass. 525. *Lowe* v. *Harwood*, 139 Mass. 133. The case of *Pomroy* v. *Gold*, 2 Met. 500, is explained in *Carpenter* v. *Holcomb*, 105 Mass. 280, 284.

If the defendant in the case at bar had done no more than notify the plaintiff of the violation of the building laws, this would not have dispensed with the necessity of notifying him that the decision of Follansbee had been reversed by Barry on appeal, if the violation was ground for his refusing to go on. But the defendant did more than that. He discharged the mortgages to him conditioned for the payment of $36,000. We have assumed that the act of discharging the mortgages conditioned for the payment of the $36,000 was not decisive. We assume that a new mortgage could have been drawn and that no liens would have been good against the new mortgage which would not have been good against the mortgages which were discharged and under which no money had been advanced. The significance of the discharge of the mortgages lies in what that act would be fairly taken by the plaintiffs to mean. In determining that question the rule is that if the words used are doubtful they will be construed against the party using them in case the other party acted on them and was misled by them. *Barney* v. *Newcomb*, 9 Cush. 46. *Bascom* v. *Smith*, 164 Mass. 61. But

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in addition to discharging the mortgages the defendant left the State, and apparently left word at his office that he had gone away, but no word as to where he had gone. The plaintiffs forbore to ask for the conversation which Foternick had with the person left in charge of the defendant's office on the defendant's objecting to its being put in evidence. What he was told when he called at the defendant's office at that time is material in this connection. Something further may appear when the case is tried again, and we express no final opinion on this matter.

The defendant has further contended that even if the plaintiffs were excused from performance the plaintiffs did not make out a case because they did not notify the defendant of the reversal of Follansbee's decision, and because they did not show that they were able to make the mortgage for $36,000 a first mortgage, and lastly because the time for performance had not come within *Daniels* v. *Newton*, 114 Mass. 530.

If the plaintiffs were excused from performance either because the defendant left to evade a tender or because his acts taken as a whole amounted to a total repudiation of his agreement, the plaintiffs were excused from giving that notice. What is said in *Scanlan* v. *Geddes*, 112 Mass. 15, 17, as to the necessity in such a case of a plaintiff making known to the defendant that he is ready and willing to go on, must be taken to have reference to the fact that in that case the plaintiff did make known to the defendant that he was ready to go on with the contract before the repudiation. If the plaintiff is not in default and the time for performance has not gone by, the plaintiff can maintain an action on the defendant's wholly repudiating the contract without giving notice after the repudiation takes place that he is ready to go on. See in this connection *Lowe* v. *Harwood*, 139 Mass. 133, 135.

No question was raised at the trial as to the plaintiffs' not having shown that they were able to make the mortgage for $36,000 a first mortgage and under the ruling which was made we do not think that it is open now. It is by no means clear that they had to show that fact in case they were excused from showing performance. It was held in *Lowe* v. *Harwood*, 139 Mass. 133, that a purchaser could maintain an action against a vendor of real estate on the vendor's repudiating his contract

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without proving that he could have paid for the land, and this decision was put on the ground that "the degree of his ability [to pay for it] at any moment before he was called on to pay was no concern of the defendant's. The way for the defendant to test that was to tender performance on his side conditionally upon the plaintiff's performing his part of the agreement." Further facts in this connection may appear when the case is tried anew.

There is nothing in the suggestion of the defendant that this case comes within *Daniels* v. *Newton*, 114 Mass. 530. No day of the year was fixed for the payment of the $36,000 or any part of it. The time for the payment had come so far as the calendar goes. It only remained to show performance or an excuse from performance on the part of the plaintiffs to entitle them to maintain their action. In such a case the doctrine of *Daniels* v. *Newton* does not apply, as is recognized in that case. See *Daniels* v. *Newton*, 114 Mass. 530, 533. See also *Nason* v. *Holt*, 114 Mass. 541, 542. The case comes within *Parker* v. *Russell*, 133 Mass. 74; *Lowe* v. *Harwood*, 139 Mass. 133.

The construction of the contract adopted by the presiding judge is in our opinion wrong. As the question has been fully argued and may be material on the new trial, we will decide it now.

The presiding judge ruled that the plaintiffs were not entitled to the first payment of $20,000 to pay off the prior mortgages of $10,800 and $7,800.

The defendant contends that the case of *Gormley* v. *Kyle*, 137 Mass. 189, is decisive of the correctness of the ruling. But there is nothing in that case which affects the question. In *Gormley* v. *Kyle*, before there was any default on the part of the purchaser the vendor tendered a deed of land which was to be conveyed free from incumbrance without discharging an outstanding incumbrance. It was held that it was no answer to say that the defendant could have retained enough of the purchase money to pay off that incumbrance. There is nothing in that case which holds that if the plaintiff had told the defendant that when it came to passing the papers he should have a release of the outstanding incumbrance duly executed, ready to be delivered on payment of the amount due thereon,

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which was less than the purchase money, the offer would not have been a good offer of a readiness to perform, or that a tender of a deed coupled with such a release would not have been a good tender.

It is true, however, that taken literally the words used require the construction contended for by the defendant. But it is stipulated in the contract that if the defendant elects to assume the first mortgage for $10,800, the amount of the first payment was to be $9,200 in place of $20,000. That shows that it was understood that $10,800 of the $20,000 was to be used in paying off the original first mortgage and was not to be used for anything else, and if not so used was not to be advanced. There is nothing to show that there was to be such a difference between the mortgage for $10,800, which was the only incumbrance on the property when the contract was made on April 13, and any other incumbrance that might be on the property when the time for the first payment came as to preclude the remaining $9,200 being used to pay off the other incumbrances. The very object of the agreement leads to the same construction, namely, to provide the money necessary to carry the plaintiffs through until the buildings were completed.

For these reasons we are of opinion that the ruling was wrong, and that the plaintiffs had the right to look to the $20,000 to make the mortgage for $36,000 a first mortgage.

Exceptions sustained.

COMMONWEALTH *vs.* ANNA CONLIN.

Berkshire. September 8, 1903. — October 19, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Drunkenness. Practice, Criminal.

Under R. L. c. 212, § 39, one may be convicted of "drunkenness by the voluntary use of intoxicating liquor" although the offence was committed in a private dwelling house without causing public disturbance.

If a defendant is brought regularly before a court to answer to a complaint for

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drunkenness under R. L. c. 212, § 39, it is immaterial upon the issue of his guilt whether he was arrested legally or illegally, or was arrested at all, before the complaint was made.

Where a bill of exceptions in a criminal case alleges that the defendant was "brought before said court by virtue of a complaint in due form of law, issued by said court", and nothing in the record indicates that any question of jurisdiction was raised, it will be assumed that a warrant was duly issued and served.

COMPLAINT, received and sworn to in the District Court of Northern Berkshire on March 21, 1903, under R. L. c. 212, § 39, charging the defendant with drunkenness by the voluntary use of intoxicating liquor at North Adams on March 20, 1903.

On appeal to the Superior Court the defendant was tried before *Schofield*, J., who ruled as stated in the opinion. The jury returned a verdict of guilty; and the defendant alleged exceptions.

P. J. Moore, for the defendant.

J. F. Noxon, District Attorney, for the Commonwealth.

KNOWLTON, C. J. At the trial upon this complaint for drunkenness the defendant offered no evidence, but requested the judge to rule "that upon all the evidence, the defendant could not be convicted." The judge refused so to rule and instructed the jury "that if they were satisfied upon all the evidence that the defendant, when found in this room, was drunk by the voluntary use of intoxicating liquor, she might be convicted under this complaint." To the refusal and to the instruction, an exception was taken.

The evidence tended strongly to show that the defendant was very much intoxicated by the use of whiskey at the time of the original arrest, although she was lying upon a couch and was making no noise or other disturbance. The exception presents the question whether one can be convicted of drunkenness in a private dwelling house, where he is making no disturbance and is not exposed to public view. This question is answered by the language of the R. L. c. 212, § 39. The offence made punishable by this section is "drunkenness by the voluntary use of intoxicating liquor," and the place where the offence is committed, whether public or private, is not an element to be considered in determining whether an accused person is guilty under the law. None of the cases relied on by the defendant bear upon the construction of this statute.

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The defendant contends that her arrest without a warrant was illegal, and that therefore she could not be convicted upon the complaint. The legality or illegality of the arrest does not in any way affect the offence with which she was charged in the complaint. In *Commonwealth* v. *Tay*, 170 Mass. 192, it was held that the Superior Court has jurisdiction on appeal to try upon a complaint for being an idle and disorderly person, one arrested without a warrant, whether his arrest was legal or illegal. So here, if the defendant was regularly brought before the court to answer to a complaint for drunkenness which had been duly made and received, it was immaterial upon the question of her guilt whether she had been arrested legally or illegally, or arrested at all, before the complaint was made. The record shows that she was "brought before said court by virtue of a complaint in due form of law, issued by said court," etc., and nothing in the record indicates that any question of jurisdiction was raised, either before the district court or before the Superior Court. Although the warrant is not set out in the record, we infer that a warrant on the complaint was duly issued and served. Inasmuch as the warrant is merely the process by which the defendant is brought before the court, it is not the usual practice to send to this court a copy of it, where the jurisdiction is not questioned. Upon the whole record we must assume that the court had jurisdiction. At the trial no request was made, no instruction was given and, so far as we can see, no question was raised in regard to jurisdiction. The only question was whether the evidence warranted a conviction of the offence charged.

Exceptions overruled.

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COMMONWEALTH *vs.* JAMES E. COLEMAN.
SAME *vs.* FRANK V. WOOD.

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Franklin. September 15, 1903. — October 19, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Lottery. Pleading, Criminal. Constitutional Law. Words, "Turkey."

The provision of R. L. c. 214, § 8, that whoever "knowingly suffers money or other property to be raffled for" in a house, shop or building controlled by him, "or to be won there by throwing or using dice or by any other game of chance" shall be punished as therein provided, describes only one offence.

A complaint under R. L. c. 214, § 8, charging that the defendant at Northfield "in a building occupied by him and under his control, to wit, the hotel building known as the Loveland House, knowingly did suffer a certain turkey to be raffled for and to be won by throwing dice" sufficiently designates the place where the offence is alleged to have been committed.

A complaint under R. L. c. 214, § 8, charging the defendant with suffering a turkey to be raffled for and to be won by throwing dice in a certain building occupied by the defendant and under his control, need not set forth the names of the persons permitted to raffle for the turkey or the name of the person who was suffered to win it by throwing dice.

R. L. c. 214, § 8, providing a punishment for one who "in a house, shop or building owned or occupied by him or under his control" knowingly suffers money or other property to be raffled for or to be won there by throwing dice or any other game of chance, applies to one who occupies and controls a part of a building where he suffers the prohibited acts to be done.

Under R. L. c. 214, § 28, providing that on a complaint or indictment for violation of any law relative to lotteries or any form of gaming no variance shall be deemed material if the complaint or indictment is sufficient to enable the defendant to understand the charge and to prepare his defence, a complaint will not be held insufficient for failing to aver that the defendant's occupation and control of a certain hotel building, in which a raffle for a turkey was alleged to have occurred, did not include one small room on the ground floor let to another person, nor will such a complaint be held to be insufficient in using the word "turkey" to describe a dead turkey.

Article 12 of the Declaration of Rights, securing to an accused person the right to have his crime or offence "fully and plainly, substantially and formally, described to him" is not violated by R. L. c. 214, § 28, providing that no complaint or indictment for violation of any law relative to lotteries or any form of gaming shall be held insufficient, if it is sufficient to enable the defendant to understand the charge and to prepare his defence.

TWO COMPLAINTS, received and sworn to in the District Court of Franklin on December 4, 1902, under R. L. c. 214, § 8, each

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alleging that the defendant on November 26, 1902, "at Northfield in the county of Franklin in a building occupied by him and under his control, to wit, the hotel building known as the Loveland House, knowingly did suffer a certain turkey to be raffled for and to be won by throwing dice."

On appeal to the Superior Court the defendants were tried before *Fessenden*, J. The jury in each case found the defendant guilty, and the defendants alleged exceptions, raising the questions stated by the court.

F. L. Greene, (*W. A. Davenport* with him,) for the defendants.

D. Malone, District Attorney, for the plaintiff.

KNOWLTON, C. J. The questions of law raised by the bills of exceptions in these two cases, are the same in each, and our discussion in the first case will be equally applicable to the second also.

The defendant assigned three grounds for his motion to quash, first, because two separate and distinct offences are set forth in the same complaint; second, because there is no sufficient allegation of the place where the defendant is alleged to have suffered the turkey to be won by throwing dice; third, because there is no allegation as to the person who, by the sufferance of the defendant, won the turkey, nor any averment that such person's name is unknown.

1. The complaint is founded on the R. L. c. 214, § 8, and the first question is whether one who "knowingly suffers money or other property to be raffled for in such house, shop or building," and "to be won there by throwing or using dice or by any other game of chance," is guilty of one offence under this section, or of two different offences, for each of which he is subject to punishment. We think it pretty plain that this part of the statute describes but one offence, which is knowingly permitting, in a place under one's control, a raffle, or lottery, or other game of chance for the disposition of property to be carried on. Suffering property to be raffled for, and suffering it to be won in either of the ways mentioned, are only different acts, made punishable as different parts or stages of the same offence, and which, singly or together, subject the offender to but one punishment. Such acts may be joined in one count. *Commonwealth* v. *Eaton*, 15 Pick. 273. *Stevens* v. *Commonwealth*, 6 Met. 241. *Common-*

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wealth v. *Twitchell*, 4 Cush. 74. *Commonwealth* v. *Hall*, 4 Allen, 305. *Commonwealth* v. *Nichols*, 10 Allen, 199. *Commonwealth* v. *Ferry*, 146 Mass. 203, 208.

2. The allegation of the place where the defendant suffered the turkey to be raffled for, designates the building distinctly, and is sufficient in form. The contention that there was a variance between the allegation and the proof will be considered later.

3. The answer to the question whether the complaint should give the names of the persons who were permitted to raffle for the turkey and the name of the person who was suffered to win it by throwing dice, depends upon the nature of the offence described in the statute. The case most favorable to the defendant's contention on this point is *Commonwealth* v. *Sheedy*, 159 Mass. 55, in which it was held in a prosecution under § 7 of the chapter which is the foundation of this complaint, that a charge of a single act of disposing of a single article by way of lottery, must state the name of the person to whom it was disposed of, or must aver that his name is unknown. The offence was treated as consisting of a single act, and the act was treated as necessarily involving the person who received the property. But the case shows that there are decisions upon complaints very closely analogous to the one now before us in which it was held that the name of the person receiving the property need not be given. *Commonwealth* v. *Horton*, 2 Gray, 69. *Commonwealth* v. *Harris*, 13 Allen, 534. *Commonwealth* v. *Sullivan*, 146 Mass. 142. *Commonwealth* v. *Brockway*, 150 Mass. 322. In the later case of *Commonwealth* v. *Swain*, 160 Mass. 354, it was held that where the offence is being present in a room, engaged in certain prohibited business, it is not necessary to mention the names of the persons participating in the prohibited acts. The substance of the offence here is knowingly suffering a lottery to be conducted in a place under the defendant's control, and we are of opinion that the rule stated in *Commonwealth* v. *Swain* should be applied, rather than the rule in *Commonwealth* v. *Thurlow*, 24 Pick. 374, and other similar cases cited in *Commonwealth* v. *Sheedy*, *ubi supra*. The motion to quash was rightly overruled.

4. The defendant contends that there was a variance between the complaint and the proof in two particulars, namely: first, in

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that it did not appear that the building referred to was occupied by or under the control of the defendant; and secondly, that it did not appear that a turkey was raffled for and won by throwing or using dice but only the dead body of a turkey dressed for use as an article of food. It appeared that the defendant occupied and controlled the hotel building known as the Loveland House, except a small room on the ground floor which was used for a Chinese laundry.

One question presented is whether under this statute, there can be a conviction of a person who occupies a building other than a shop, if his occupation or control is of only a part of the building. It has been held under the statute which punishes as the maintenance of a common nuisance the keeping of a "building, place or tenement" used for the illegal sale or illegal keeping of intoxicating liquor, that an indictment for the keeping of a building cannot be sustained unless it is proved that the defendant kept the whole building. *Commonwealth* v. *McCaughey*, 9 Gray, 296. *Commonwealth* v. *Bossidy*, 112 Mass. 277. But this is because of the peculiar language of the statute, which recognizes a distinction between a building and a tenement in a building. The statute now in question is different. It punishes the offence when committed in a "house, shop or building." As to the culpability of the occupant, it recognizes no difference between a house and a part of a house, or a building and a part of a building. There is special mention of a shop, but there is no special provision referring to a part of a house or building if the part is not a shop. It cannot have been intended that guilt or innocence under the statute should depend upon whether the occupant of the building where the offence is committed occupies or controls the whole or only a part of the building. We are of opinion that one who suffers the prohibited act to be done in a building, is within the language of the statute if he is in only a part of the building and occupies or controls the part where he suffers the prohibited acts to be done, as well as when he occupies and controls the whole. Any other construction of the statute would render it nugatory except in those cases where he was in a shop, or where he occupied and controlled the whole building, however large it might be.

The next question is whether, when the building occupied by

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him and under his control is only a part of the entire structure, it is necessary, according to the ordinary rules of pleading, to set out that fact, or whether it is enough to mention the building which he occupies or controls, leaving the rule of statutory construction applicable to the case, to cover the ambiguity as to the extent of his occupation or control. The complaint would have been more definite if, after the words "Loveland House", it had mentioned, under a *videlicet*, the part of the building used for hotel purposes. If we assume without deciding, that under general rules of pleading the complaint would be fatally defective in this particular in its application to the facts proved, we are of opinion that the R. L. c. 214, § 28, relieves the Commonwealth of difficulty. This statute is as follows: "No plea of misnomer shall be received to a complaint or indictment for violation of any law relative to lotteries, policy lotteries or policy, the selling of pools or registering of bets, or any form of gaming; but the defendant may be arraigned and tried and, if convicted, sentenced and punished under any name by which he is complained of or indicted. No such complaint or indictment shall be abated, quashed or held insufficient by reason of any alleged defect, either of form or substance, if the same is sufficient to enable the defendant to understand the charge and to prepare his defence. No variance between such complaint or indictment and the evidence shall be deemed material, unless in some matter of substance essential to the charge under the rule above prescribed." The variance is not material under this statute if the complaint is sufficient to enable the defendant to understand the charge and to prepare his defence. There can be no doubt that this complaint was sufficient in this particular. The defendant could not have been misled or left in doubt in regard to the charge against him, because the complaint failed to aver that his occupation and control of the hotel building known as the Loveland House did not include one small room on the ground floor rented to another person. The statute was intended to cover cases like this and plainly it is applicable.

5. It is clearly applicable to the other alleged variance in that the property referred to is described as a turkey, which in a complaint for larceny would mean a living turkey, when in fact it was a dead turkey. See *Commonwealth* v. *Beaman*, 8 Gray,

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497. There is no doubt that the statute is applicable to the disposition of any kind of property, and the only question is whether the defendant was misled or sufficiently informed as to the charge. In *Commonwealth* v. *Hodgkins*, 170 Mass. 197, where the statute was held applicable to dead lobsters and to living ones, it was decided that there was no material variance between a complaint which charged the possession of lobsters and proof which showed the possession of dead lobsters. In common speech the word "turkey" is applied to a dead fowl sold in the market, as well as to a living animal. Under this statute we are of opinion that there was no variance which affected the rights of the defendant.

Although the subject was brought to our attention by the district attorney, it was not contended by the defendant's counsel that the part of the statute applicable to this case is unconstitutional. In *Commonwealth* v. *Robertson*, 162 Mass. 90, 96, it was said that, "The provisions of Article XII. of the Declaration of Rights, which secure to the accused person the right to have his crime or offence 'fully and plainly, substantially and formally, described to him,' only require such particularity of allegation as may be of service to him in enabling him to understand the charge and to prepare his defence." See also *Commonwealth* v. *Cody*, 165 Mass. 133, 137; *Commonwealth* v. *Dill*, 160 Mass. 536; *Commonwealth* v. *Hall*, 97 Mass. 570. We are of opinion that this provision of the statute is constitutional. In each case the entry will be

Exceptions overruled.

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MATTHEW DOOLEY, administrator, *vs.* GREENFIELD AND TURNERS FALLS STREET RAILWAY COMPANY.

Franklin. September 15, 1903. — October 20, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Negligence.

In an action against a street railway company for the death of the plaintiff's intestate, alleged to have been caused by being run into from behind by a car of the defendant on a highway, it appeared, that the plaintiff's intestate was run over on a cloudy night, when a strong wind was blowing, in the direction opposite to that in which the car was moving, and was making a great noise in the trees, and it was assumed by the court for the purpose of decision, that it might have been found that, when the car was approaching the plaintiff's intestate from behind and was only twenty or thirty feet distant, the intestate was walking between the rails of the defendant's track to avoid a wagon approaching him in front. *Held*, that, on this assumption, there was no evidence of due care on the part of the plaintiff's intestate which would justify the submission of the case to the jury.

TORT for the death of the plaintiff's intestate from being run into by a car of the defendant in the southerly part of Greenfield, known as Cheapside, upon the highway leading from Greenfield to Deerfield. Writ dated October 10, 1900.

In the Superior Court the case was tried before *Holmes*, J., who ruled that upon all the evidence the plaintiff was not entitled to recover and ordered a verdict for the defendant. The plaintiff alleged exceptions.

A. L. Green, (*B. H. Winn* with him,) for the plaintiff.

D. Malone, for the defendant.

BARKER, J. The plaintiff's intestate was run over and dragged along the ground for some distance by one of the defendant's street cars on September 12, 1900, and was dead when picked up. The action was for negligently causing his death. The motorman of the car and three passengers testified that the deceased was lying on the track between the rails when first seen by them and that he lay motionless until struck and dragged by the car, almost instantly after he first became visible to them, and there was no evidence to contradict this testimony.

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The evidence which the plaintiff contends should have been submitted to the jury upon the question whether the deceased came to his death while in the exercise of due care was that of four persons who testified that they were riding upon the highway in wagons drawn by horses, and of one person who was riding a bicycle, all going in the direction opposite to that of the deceased and of the street car, and that shortly before the accident they met the deceased walking in the highway in the opposite direction to that in which these witnesses were going. This evidence, if believed, would justify an inference that when seen by these witnesses the deceased was walking along the highway towards his home. Three of these witnesses testified that they were in one wagon, and this wagon was the earlier of the two to meet the deceased. The bicyclist was alone and met the deceased after the meeting between him and the first wagon. The other of these witnesses testified that he was alone in a wagon which rattled and made much noise and that he was driving at the rate of eight or nine miles an hour.

The highway was fifty-five feet wide, with the car track within its limits and south of its centre line. North of the centre line was a macadam driveway twenty-six feet wide. At the place where the deceased was struck a pathway made smooth by the use of foot travellers and bicyclists ran along between the rails of the car track. According to the testimony of the witnesses who testified that they were in the first wagon the deceased when seen by them was walking next to the inside rail of a curve and on the outside of the rail next the highway. The bicyclist testified that the deceased was walking outside of the rails when he first saw him and that the deceased stepped between the rails to get out of the way of the bicycle. The witness who testified that he was riding in the second wagon testified that the deceased was walking between the rails. The night was cloudy with a strong wind which blew in the direction opposite to that in which the car was moving, and which made a great noise in the trees.

Neither of the witnesses who testified to meeting the deceased walking saw anything of the accident or knew until the next day that an accident happened. The plaintiff admits that when the deceased was met by the first wagon the car was more than

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half a mile away, and that it was not in sight when the deceased was met by the bicyclist. The witness who testified that he rode in the second wagon testified that when he passed the deceased the car was from twenty to thirty feet away from the deceased, and that the witness did not see the car stop and did not stop himself, and that the deceased was walking along looking ahead and did not turn his head either way to right or left. He also testified that he said nothing to the deceased and did not warn him that the car was coming or say anything to him whatever; that he did not stop to see if any accident happened because he did not think there would be any; that he supposed the deceased would get off the track.

Unless it was competent for the jury to find from the evidence that the deceased did for his own safety what ordinarily careful persons are accustomed to do under like circumstances the verdict for the defendant was ordered rightly, because of the plaintiff's failure to show that his intestate was in the exercise of due care.

Assuming that the jury might find, against the testimony of the four witnesses who swore that they saw the deceased lying on the track between the rails, that he was walking between the rails to avoid a wagon approaching him in front, and that when the wagon passed him the car was approaching him from behind and was only twenty or thirty feet distant, under such circumstances an ordinarily careful person would step off the track and out of the way of the car, as the witness who testified that he saw the deceased in such circumstances testified that he expected him to do.

There was no testimony that the deceased was so walking when struck by the car, and even if it could be so inferred, no reason consistent with his due care for his continuance upon the track could be drawn except by conjecture. In our opinion there was no sufficient evidence ~~to~~ justify the submission of the case to a jury. See *Hillyer* v. *Dickinson*, 154 Mass. 502; *Brooks* v. *Old Colony Railroad*, 168 Mass. 164.

Exceptions overruled.

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EDGAR F. COPELAND *vs.* BOSTON DAIRY COMPANY.

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Franklin. September 15, 1903. — October 20, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Contract. Milk. Evidence, Burden of proof. *Agency.*

A contract to sell milk means a contract to sell milk of the standard quality required by R. L. c. 56, § 56.

In an action for the price of milk the burden is on the plaintiff to prove that the milk furnished by him was of the standard quality required by R. L. c. 56, § 56.

In an action by a farmer against a milk dealer for milk sold and delivered, it appeared, that the milk was put into cans furnished by the defendant and was collected from the plaintiff and other farmers by a teamster, who was paid by the defendant a fixed price for the transportation of each can, which was deducted from the sum agreed to be paid to the farmers. The teamster made his own arrangement with the farmers for the sum per can to be paid for the transportation. Each month a pass book was furnished by the defendant to the teamster, in which he recorded daily the number of cans of milk furnished by each farmer, and at the end of each month forwarded the book to the defendant. Certain of these pass books were admitted in evidence against the objection of the defendant. *Held*, that if, as seemed, the teamster was paid both by the plaintiff and the defendant, he was their common agent and the pass books were admissible against either.

CONTRACT for the price of milk alleged to have been furnished to the defendant in March and April, 1900. Writ dated December 15, 1900.

At the trial in the Superior Court before *Lawton*, J., it appeared that the plaintiff was a farmer in Colerain, and that the defendant was a corporation selling milk in Boston and in March and April, 1900, purchased milk from farmers in Colerain; that the milk was put by each farmer into cans furnished by the defendant, holding eight and one half quarts each, and payment was made monthly according to the number of cans furnished. These cans of milk were collected daily from the farmers by a teamster, carried to Greenfield and there delivered to an agent of the defendant upon a railroad car and transported under such agent's custody to Boston. The teamster was paid by the defendant a fixed price per can for each can of milk carried by him, which price was deducted from the sum agreed to be paid to

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each farmer for a can of milk. The agent upon the railroad car of the defendant reported daily to the defendant the number of cans of milk received from the teamster. No record was kept by that agent or by the company of the number of cans furnished by each farmer, but each farmer had a number to which the milk was credited by the teamster. A pass book was furnished the teamster monthly by the defendant, in which to record daily the number of cans of milk furnished by each farmer. At the head of each page was entered the name of a farmer, and the page was so ruled, with numbers printed for the days from one to thirty-one, as to afford convenient columns for entering the number of cans of milk received and the number of cans returned. At the end of each month the teamster forwarded these books to the defendant by the defendant's agent upon the railroad car, and later received from that agent a sealed envelope. The teamster, who was called a collector, made his own arrangements with the farmers for the sum per can to be paid him. Two of these pass books, identified by the defendant's agent upon the railroad car, were offered in evidence by the plaintiff, and admitted by the judge against the objection of the defendant.

The plaintiff called as a witness the president of the defendant corporation, who testified in substance that the pass books exhibited to him bore the name of the defendant and were furnished by it; that he had no doubt that the writing on the covers of the pass books was put in by some one at the office of the defendant; that he did not see it done, but assumed such to be the fact "because they are written that way." In the course of his examination he was asked the following questions:

"Have you any question that those [entries on covers of books] were made out in the office?" "Have you any doubt that the figures, the writing, put in there were put in by some one at your office?" These questions were objected to by the defendant and allowed by the judge.

The defendant contended that whatever liquid purporting to be milk was delivered to it by the plaintiff, had been watered, and did not contain the amount of solids required by R. L. c. 56, §§ 55, 56. There was evidence tending to show that the liquid purporting to be milk, delivered by the plaintiff to the defend-

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ant, contained water, and did not contain the amount of solids required by law. This was denied by the plaintiff.

The judge instructed the jury, among other things, that the burden of proof was upon the defendant to satisfy them that the milk furnished by the plaintiff was not up to the standard, if such were the fact.

The jury returned a verdict for the plaintiff in the sum of $257.42; and the defendant alleged exceptions.

F. L. Greene, (*W. A. Davenport & F. M. Ives* with him,) for the defendant.

D. Malone, for the plaintiff.

LORING, J. The exceptions in this case must be sustained.

By R. L. c. 56, §§ 56, 57, it is a criminal offence to sell milk which upon analysis is shown to contain less than the percentage of milk solids or milk fat there specified. A contract for the delivery of any other kind of milk would not support an action. See in this connection *Miller* v. *Post*, 1 Allen, 434. A contract to deliver milk means as matter of construction a contract to deliver milk up to the standard prescribed in R. L. c. 56, § 56, and a delivery of any other kind of milk would fail as matter of description to be a compliance with a contract to sell and deliver milk. The burden was on the plaintiff to prove that the milk delivered by him was up to this standard.

The pass books seem to have been admissible in evidence without the testimony of the president of the defendant company which was objected to. As we understand the bill of exceptions, the collector or teamster was paid both by the plaintiff and the defendant. If so, he was their common agent, and a pass book kept by him was admissible against either.

Exceptions sustained.

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WILLIAM G. BASSETT, Judge of Probate, *vs.* FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

Hampshire. September 15, 1903. — October 20, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Executor. Surety. Bond.

The surety on an executor's bond is liable for the full amount due the testator from an insolvent firm of which the executor was a member, although the firm and the executor were insolvent at the time of the testator's death.

If a debt from an executor to his testator is due on demand, the executor cannot set up that no such demand was made or that he could not make a demand on himself.

In an action on an executor's bond, where it appears that the executor is chargeable with funds in his hands for which he negligently has failed to account, to an amount in excess of the penal sum of the bond, he and his sureties are liable for the penal sum of the bond with interest from at least the date of the writ.

CONTRACT in the name of the Judge of Probate for Hampshire County against the surety on the bond of William B. and Edmund H. Sawyer, as executors under the will of Sarah J. Sawyer. Writ dated January 18, 1902.

At the trial in the Superior Court before *Maynard*, J., it appeared that William B. and Edmund H. Sawyer were appointed executors under the will of Sarah J. Sawyer on December 8, 1898, and resigned their trust on October 2, 1900. They were succeeded by George L. Loomis, and upon his death Carlos C. Tracey was appointed administrator *de bonis non* with the will annexed and was the administrator for whose benefit this action was brought.

It was admitted that a technical breach of the bond had occurred by reason of the failure of the executors to file any account. Accordingly judgment was entered for $25,000, the penal sum of the bond, and the case was referred to an assessor to determine for what amount execution should issue.

It appeared in evidence that Edmund H. Sawyer, one of the executors of the will of Sarah J. Sawyer, formed a partnership with one Wolf in 1894, which continued until early in 1900.

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The defendant contended that on all the evidence it appeared that an agreement existed between Edmund H. Sawyer and his mother, the testatrix, that certain sums advanced by her were to be at the risk of the business of Sawyer and Wolf and were not an indebtedness of Sawyer and Wolf or Edmund H. Sawyer to the testatrix. The defendant further contended that on all the evidence it appeared that the firm and its members were insolvent at the time of the death of the testatrix, and asked the assessor to rule that if the executor was insolvent and unable to pay any indebtedness to the estate, the surety could not be charged. The assessor refused so to rule and charged the defendant with $22,697.19 under specification 2 (being the items of the inventory marked "notes of Sawyer & Wolf $18,453," with interest) and with $4,389 under specification 19 (being the item of the inventory marked "39 shares Glendale Elastic Fabrics Co.," with interest), a total of $27,087.19. This amount being in excess of the penal sum of the bond, the assessor charged the defendant with the amount of the penalty of the bond, $25,000, with interest thereon from the date of the writ.

At the request of both parties the evidence was reported in full by the assessor and made a part of his report. The report and evidence were made a part of the bill of exceptions.

The defendant filed certain objections and exceptions to the assessor's report. Upon the filing of the assessor's report the defendant moved that the report be recommitted for the purpose of taking further evidence of the insolvency of Sawyer and Wolf and Edmund H. Sawyer during the term of his executorship. The judge denied the motion, on the sole ground that as matter of law the insolvency of the executor or executors was immaterial to the issue. To this ruling the defendant excepted. The judge overruled the defendant's exceptions to the assessor's report, and ordered that execution issue upon the full amount of judgment and interest thereon from the date of the rendition thereof. The defendant alleged exceptions.

E. K. Arnold, for the defendant.

J. C. Hammond, (*H. P. Field* with him,) for the plaintiff.

LORING, J. The principal exception of the defendant corporation is to the refusal of the judge to recommit the case to the assessor to take evidence as to the insolvency of the executor,

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and of the firm of which he was a member at the date of the testatrix's decease.

The contention which has been made in support of this exception is that the obligation of a surety on an executor's bond goes no farther than to guarantee that the executor will lawfully administer the assets of the testatrix which had an existence in fact and which came to his hands or knowledge, and that it is beyond the scope of such a bond to create assets which the testatrix never had by making the surety guarantee debts due from insolvent debtors; and for that reason it cannot be made liable for the full amount of the notes held by the testatrix made by the executor's insolvent firm.

But there is another side to the case. An executor or administrator is appointed for the sole purpose of enforcing in behalf of those interested in the estate the rights of the estate against others. When the estate has a claim against the executor or administrator himself, he is incapacitated from performing that duty and taking to himself that office. For that reason, on broad principles of policy it was laid down by the common law of England that he must yield all controversy as to the debt due from himself and treat it as an asset of the estate. No one is bound to accept the office, and if he elects to do so he thereby tacitly assents to this condition.

The common law did not allow him to accept the office and keep his rights in a controversy when his duty and his personal interest were in a direct conflict. To allow him to accept the office and then to settle the amount which the creditors and others interested in the estate would have got had he not taken the office but had allowed some disinterested person to be appointed to enforce these rights would not be doing justice to those whose rights the law undertakes to preserve. Take the case at bar as an example. The executor's firm was going on with its business when the testatrix died, and went on in business for some fourteen months after that time. The law could hardly be said to have fully preserved the rights of those interested in the estate if it allowed this creditor of the estate to accept an office where it became his duty to collect the amount due from his own firm by pressing for payment and after fourteen months of inaction on his part to settle the rights of the

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beneficiaries by a judicial inquiry as to what would have happened had a disinterested person been appointed to perform the duty owed to these beneficiaries.

But it is not necessary to discuss the question further. It is concluded by authority in this Commonwealth. The rule was originally laid down in 1814, in *Stevens* v. *Gaylord*, 11 Mass. 256. The history of the rule and the cases, both in England and in this country, are given in *Winship* v. *Bass*, 12 Mass. 199, and in *Tarbell* v. *Jewett*, 129 Mass. 457. The rule is one of general application and has been held to be applicable not only in case of executors and administrators, but also in case of assignees in insolvency, *Benchley* v. *Chapin*, 10 Cush. 173, guardians, *Mattoon* v. *Cowing*, 13 Gray, 387, and receivers appointed to wind up insolvent corporations. *Commonwealth* v. *Gould*, 118 Mass. 300. It has been recognized and applied in the following cases in addition to those cited above: *Hobart* v. *Stone*, 10 Pick. 215; *Kinney* v. *Ensign*, 18 Pick. 232; *Ipswich Manuf. Co.* v. *Story*, 5 Met. 310; *Sigourney* v. *Wetherell*, 6 Met. 553; *Willey* v. *Thompson*, 9 Met. 329; *Chenery* v. *Davis*, 16 Gray, 89; *Leland* v. *Felton*, 1 Allen, 531; *Chapin* v. *Waters*, 110 Mass. 195; *Hazelton* v. *Valentine*, 113 Mass. 472; *Choate* v. *Arrington*, 116 Mass. 552; *Pettee* v. *Peppard*, 120 Mass. 522; *Martin* v. *Smith*, 124 Mass. 111; *Choate* v. *Thorndike*, 138 Mass. 371; *Stetson* v. *Moulton*, 140 Mass. 597.

And, finally, it was held in *Leland* v. *Felton*, 1 Allen, 531, that an executor should be charged with the full amount of notes belonging to the testator made by a firm of which he was a partner, although it was insolvent when the testator died, as well as with the full amount due on notes made by himself, who also was insolvent at that time.

The defendant in the case at bar asks us to hold that although an insolvent executor is to be charged with the debt due from him the sureties on his bond are not to be held liable therefor. But that is out of the question. That contention flies directly in the face of the elementary principles governing the effect of a decree allowing a probate account, and the elementary principles as to the obligation of a surety on a probate bond.

In the first place, a decree of a Probate Court allowing an account of an executor or other official is binding on all inter-

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ested in the estate including sureties on the bond of the accountant. If there is error, the error must be corrected in the Probate Court, as it may be if there was fraud or if the party in question had not such notice as to be concluded by the decree. *Jennison* v. *Hapgood*, 7 Pick. 1. *Sever* v. *Russell*, 4 Cush. 513. *Parcher* v. *Bussell*, 11 Cush. 107. It is settled that a surety on a probate bond is a party interested in the accounts of the principal, and for that reason has a right of appeal to the Supreme Judicial Court. *Farrar* v. *Parker*, 3 Allen, 556.

In the second place the obligation of a surety on a probate bond is the obligation of the principal. The bond is a joint bond and the judgment necessarily must be the same against both. This is more than a technical rule of law, it is an instance where the true character of a surety's liability comes to the surface. The ground on which it was held that a surety has a right of appeal in such a case was that the decree settling the account of the principal "if once properly established, fixes the amount of liability of the sureties on their bond." *Farrar* v. *Parker*, 3 Allen, 556, 558. And Endicott, J., in *Tarbell* v. *Jewett*, 129 Mass. 457, 468, speaking of *Leland* v. *Felton*, 1 Allen, 531, said that it was held that the executor would be charged for his own notes and for the notes of his firm held by the testator, although both he and the firm were insolvent, "which of course rendered his sureties liable." Again, in *Choate* v. *Arrington*, 116 Mass. 552, 556, Wells, J. said: "The surety is liable for whatever is properly chargeable to his principal in the official capacity on account of which the bond was given." To the same effect see Ames, J. in *Chapin* v. *Waters*, 110 Mass. 195, 197.

It is apparent that this was assumed to be the case in *Leland* v. *Felton*, 1 Allen, 531. In that case the executor had resigned and the plaintiff Leland had been appointed administrator with the will annexed *de bonis non*. The main contention of the defendant Felton (the executor who had resigned) was that the debt due the testator was suspended, not extinguished, by his being executor, that it was revived by his resignation and that the remedy of the administrator was an action on the notes against him and his partners in which he could recover a personal judgment, but that he could not be charged with the

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amount by the Probate Court in his executor's account. If the liability of the surety was different from that of the executor, there was no possible object in this defence. The sole purpose of the defence was to protect the sureties, and from an examination of the court records it appears that after the decision in *Leland* v. *Felton*, judgment was recovered in an action brought against the principal and sureties in the Supreme Judicial Court, in the October Term, 1863, no defence being interposed by the sureties. It further appears from an inspection of the records of the Probate Court that several payments were made on account of that judgment by one of the sureties.

The defendant's request, therefore, is a request that we overrule the case of *Leland* v. *Felton*, 1 Allen, 531. But after a careful consideration of *Baucus* v. *Stover*, 89 N. Y. 1, *Baucus* v. *Barr*, 45 Hun, 582, affirmed in 107 N. Y. 624, *Lyon* v. *Osgood*, 58 Vt. 707, *Garber* v. *Commonwealth*, 7 Penn. St. 265, *McCarty* v. *Frazer*, 62 Mo. 263, *State* v. *Gregory*, 119 Ind. 503, 509, *Harker* v. *Irick*, 2 Stockton, 269, *Spurlock* v. *Earles*, 8 Baxter, 437, cited and relied on by the defendant, we are of opinion that for the reasons given the true rule was laid down in *Leland* v. *Felton*, and that it is now too late to question the practice which was then adopted and has been in force for over forty years.

There is nothing in the other points taken by the defendant in defending its liability. There was evidence which warranted the finding made by the assessor that the sums advanced by the testatrix resulted in a debt due to her, the time for payment of which had arrived. Even if a demand had been necessary, the defendant cannot set up that no demand was made, as he seeks to do. It was his duty as executor to make a demand and he could not set up that he could not make a demand on himself. See *Stevens* v. *Gaylord*, 11 Mass. 256, 270, where Jackson, J. says: "In the case of his own debt, which he admits to be due, it is obvious that he can never prove a demand and refusal."

In the case at bar there was a breach of the bond in failing to account, an agreement for judgment in favor of the plaintiff, and the case was sent to an assessor to fix the amount for which execution should issue. He charged the executor with interest on the demand notes of his firm amounting to $18,453, and with interest on $3,500, the value of the Glendale stock, with annual

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rests at six per cent, to the date of his report; and as this sum exceeded the penal sum of the bond he reported that execution should issue for the penal sum of the bond with interest from the date of the writ. The Superior Court directed that execution should issue for the full amount of judgment and interest from the date of the rendition thereof.

The defendant contends that in contemplation of law these two sums have been in the hands of the executor since the death of the testatrix, and that on the authority of *Wyman* v. *Hubbard*, 13 Mass. 232, *Stearns* v. *Brown*, 1 Pick. 530, *Boynton* v. *Dyer*, 18 Pick. 1, 7, an executor is not chargeable with interest on funds, in his hands. But the rule laid down in the last of those cases is that an executor is not chargeable with interest "except where they actually receive it or make some profitable use of the funds, or are guilty of negligence in accounting for them." This defendant was guilty of negligence in not accounting for these two amounts.

It appears that the parties made an agreement that judgment might be entered for the penal sum of the bond, but it would seem from the record before us that no judgment has in fact been entered. The plaintiff is at least entitled to judgment for interest on the penal sum of the bond from the date of the writ, *Harris* v. *Clap*, 1 Mass. 308, *Pitts* v. *Tilden*, 2 Mass. 118, *Warner* v. *Thurlo*, 15 Mass. 154, *Bank of Brighton* v. *Smith*, 12 Allen, 243, and the amount of that judgment bears interest. We understand that the Superior Court's order was intended to be made in conformity with this. On a judgment being entered *nunc pro tunc*, execution may issue as ordered by the Superior Court.

Exceptions overruled.

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CHARLES E. HOAG *vs.* CHARLES H. ALDERMAN.

Hampden. September 22, 1903. — October 20, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Partnership. Contract. Words, "Expenses."

Although it is the rule that in the absence of an express agreement a partner is not entitled to compensation for services rendered in the business of the firm, yet the partnership may be of such a peculiar kind and the arrangement and course of dealing between the partners may be such that an agreement to pay for certain services of one of the partners may be inferred from the facts without an express agreement.

In a suit for an accounting by the defendant as a partner of the plaintiff in the purchase, management and sale of certain real estate, the defendant claimed an allowance of $500 as compensation for his services in the care and management of the property. It appeared, that the title to the property was taken in the name of the defendant and that in the receipt which he gave the plaintiff for the money contributed toward the purchase it was stated that the plaintiff was "to bear one third of the expenses in connection with said property", that the defendant took charge of necessary repairs upon the property, buying the materials and superintending the work, and that he also collected the rents. There was a third partner who retired from the partnership, and it was agreed orally by him, the plaintiff and the defendant, that the defendant should receive $1,500 for his services in connection with the property, of which the retiring partner should pay $500 and the plaintiff $500. The retiring partner paid this $500 in his settlement with the defendant. The trial judge found that the defendant was entitled to be allowed $500 for his services as against the plaintiff. *Held*, that the oral agreement, although as a new undertaking it would have been without consideration, was important evidence of the original understanding of the three partners in regard to the meaning of the term "expenses" in relation to the services of the defendant in connection with the property, and that the facts warranted the finding of the judge.

KNOWLTON, C. J. This is a bill in equity for an account from the defendant as a partner of the plaintiff in the purchase, management and sale of real estate. The only matter now in dispute is whether the defendant is entitled to an allowance of $500 which the plaintiff agreed to pay him for his services in the care and management of the property. A judge of the Superior Court heard and decided the case upon facts and evidence contained in a master's report, and the case comes before us upon exceptions taken by the plaintiff to his refusal to give certain rulings.

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The judge ruled in accordance with the eleventh request, namely: "That if the defendant chose to do a service which at the time he meant to be gratuitous, or not at the express request of the plaintiff, he cannot recover for such services, even though they are beneficial to the plaintiff," and refused the sixth and tenth requests because they were inapplicable to the case, the sixth being that a mere moral obligation is not a sufficient consideration to support even an express promise, and the tenth that a past or executed consideration is not sufficient to create a liability. He also found "that the acts of the defendant done with the knowledge and consent of the plaintiff, and more or less beneficial to him, were tantamount to a request on his part that the defendant do what he did." He found that this sum should be allowed to the defendant.

The finding is, in substance, that the defendant's services were rendered under such circumstances as to create an implied contract on the part of the plaintiff to pay for them. If there was any evidence to warrant this finding, there was no error of law in the refusal to give the rulings requested. It is a familiar rule of law that in an ordinary partnership, in the absence of an express agreement, a partner is not entitled to compensation for services rendered in the business of the firm. This rule is of general application, and is applied with considerable strictness. *Dunlap* v. *Watson*, 124 Mass. 305. The reason for it is that, in what the partner does for the firm's business, he is presumed to be acting in his own interest, and in the absence of an express agreement to the contrary, it is ordinarily expected and implied that each member of the firm will devote himself to the promotion of the interests of the partnership without compensation. It follows that courts, in ordinary cases, will not make a comparison of services rendered by the several copartners for the purpose of determining their value, or whether either of the parties shall receive compensation. This rule is founded on the presumed intent of the copartners in entering into the contract of partnership. Of course, if there is an express agreement for compensation, the agreement is given effect. The partnership may be of such a peculiar kind, and the arrangements and the course of dealing of the partners in regard to it may be such, as pretty plainly to show an expectation and

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understanding, without an express agreement upon the subject, that certain services of a copartner should be paid for. Such cases, presenting unusual conditions, are exceptions to the general rule above stated. *Bradford* v. *Kimberly*, 3 Johns. Ch. 431. *Caldwell* v. *Leiber*, 7 Paige, 483. *Emerson* v. *Durand*, 64 Wis. 111, 118. *Levi* v. *Karrick*, 13 Iowa, 344. *Lewis* v. *Moffett*, 11 Ill. 392, 399. *VanHousen* v. *Copeland*, 180 Ill. 74, 83. *Cramer* v. *Bachmann*, 68 Mo. 310. *Godfrey* v. *White*, 43 Mich. 171. *Lee* v. *Davis*, 70 Ind. 464, 469. See *Winchester* v. *Glazier*, 152 Mass. 316. The real question in each case is, What was the intention and the understanding of the parties, to be derived from their contract of copartnership. An express agreement in regard to compensation shows their intention. In the absence of an express agreement on that subject, the presumption that no compensation is to be allowed precludes compensation, unless the other agreements as to the business to be done and the mode of conducting it show that compensation for certain services was intended. If this intention is doubtful, the subsequent course of dealing and conduct of the parties may be considered in determining whether there is such an implication in favor of the allowance of compensation as is tantamount to an express agreement.

The same principle is applicable to the question whether, after the death of one of the partners, an allowance will be made for services of a surviving partner in closing and settling the business of the firm. While it is a rule that no allowance will be made in such cases, it is held in this Commonwealth, as well as elsewhere, that the circumstances may be so exceptional as to warrant giving compensation for personal services. *Robinson* v. *Simmons*, 146 Mass. 167. *Dewing* v. *Dewing*, 165 Mass. 230, 231. *Thayer* v. *Badger*, 171 Mass. 279.

In the present case the question is not whether the finding of the Superior Court in favor of the defendant was right as a finding of fact, but whether it was wrong in law. It is not a question as to the weight of the evidence, but whether there was any evidence in favor of the defendant. The report shows, in the first place, that the title was to be taken and held in the name of the defendant, whereby he had control of the property as holder of the legal title. Secondly, in the receipt which was

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given by the defendant to the plaintiff for the money contributed towards the purchase, it was expressly stated "that the plaintiff was to bear one third of the expenses in connection with said property." There were six houses, and it was found that "nearly all of said property was out of repair, and immediately after said purchases, said parties commenced to make necessary repairs." These repairs were made with the knowledge, consent and approval of all parties, there being then a third joint owner with the plaintiff and defendant, one McKean, whose share has since been set off, so that he is not interested in this suit. "The defendant had charge of nearly all of these repairs, buying the material and superintending the work." He also collected the rents. These services were of a kind that, if rendered by another person procured by the defendant for the purpose, would have been paid for as a part of the expenses which the plaintiff, by the acceptance of the writing, had agreed to bear in his proper proportion. Afterwards when an adjustment was made by which McKean, the other joint owner, retired from the enterprise, it was orally agreed by him and the plaintiff and the defendant that the defendant should receive $1,500 for his services in connection with the property, of which McKean should pay $500 and the plaintiff should pay $500; and in the conveyance of a part of the property which was made to McKean, he assumed the payment of $500 upon an outstanding mortgage accordingly. While this agreement of the plaintiff to pay the defendant would not be binding upon him for want of consideration if the defendant previously had no claim that could be enforced, and if there was no other than a moral duty of reimbursement, see *Johnson* v. *Kimball*, 172 Mass. 398, yet the fact that the three parties agreed upon the payment is important evidence of their original understanding in regard to the meaning of the term "expenses," in relation to such services as the defendant rendered in connection with the property. The partnership was very different from one for the transaction of ordinary business, to which the members of the firm are expected to devote their time and attention. While the ordinary presumption is against the finding of the Superior Court in this case, and while there is important evidence against the defendant's contention, we are of opinion that

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the facts stated in the report constitute evidence from which the judge might find as he did.

Exceptions overruled.

C. E. Hoag, pro se.

C. Gowdy & J. McKean, for the defendant.

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MICHAEL F. DRISCOLL *vs.* QUARTUS J. SMITH.

Hampden. September 22, 1903. — October 20, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Equity Pleading and Practice. Equity Jurisdiction. Way.

An objection to a bill in equity, that the plaintiff has a plain and adequate remedy at law, is waived by proceeding without objection in a hearing on the merits before a master.

A continuing interference with the plaintiff's right of passage over a private road entitles him to equitable relief, although he could maintain an action at law for the past trespasses.

Where a grantor conveys land describing it as bounding on a certain street, which is a private road over land of the grantor, the grantee, in a suit in equity against his grantor to enjoin an obstruction of the road, may show that the street named in the deed extended to a certain highway at the time of the conveyance, by evidence of the existence and use of the road, of its being commonly known as the street named, and of acts and declarations of the defendant.

In a suit in equity, by a grantee of land described in his deed as bounding on a certain street, against his grantor, to enjoin the obstruction of a private road over land of the defendant, it appeared, that at the time of the conveyance the defendant had given to the private road the name of the street mentioned in the deed, that the road then led to a certain highway, that the defendant represented to the plaintiff and other persons that it was his intention to make this road a main thoroughfare leading to the highway, and that the defendant did work upon the road in fitting it for travel. *Held*, that this evidence, together with other evidence as to the extent to which the road was used, warranted a finding and ruling, that the defendant was estopped to deny that the street named in the deed extended to the highway.

BILL IN EQUITY, filed June 21, 1900, to restrain the defendant from maintaining a barrier across a road alleged to be a part of Smith Street, a private way leading from the plaintiff's land in Chicopee, conveyed to him by the defendant, to Prospect Street, a highway in that city.

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In the Superior Court the case was heard by *Hardy*, J., who made a decree dismissing the bill. The plaintiff appealed. The defendant also appealed.

A. L. Green, (*F. F. Bennett* with him,) for the plaintiff.

W. Hamilton, (*W. H. Brooks* with him,) for the defendant.

MORTON, J. The plaintiff is the owner of a lot of land in Chicopee conveyed to him by the defendant. The deed bounds the land in part "on the northerly line of Smith Street." The bill alleges amongst other things that the defendant is the owner of the land on which Smith Street extends, and that he has built a fence across the same and forbidden the plaintiff to travel on the same and has done other things inconsistent with the plaintiff's use of the street; and it prays that the defendant may be compelled to remove the fence and may be restrained from any and all acts inconsistent with the use of the street by the plaintiff. The defendant filed an answer which set up amongst other defences that the plaintiff had a plain and adequate remedy at law and had not stated a case which entitled him to relief in equity. These grounds of objection were in the nature of a demurrer. The plaintiff joined issue and the case was sent to a master to hear the parties and report the facts and the evidence to the court. The master, without any objection, so far as appears, on the defendant's part, heard the parties and took a view and made a report of his findings with the evidence. The defendant filed exceptions in regard to matters of evidence before the master and in regard to certain findings by the master. The judge overruled all of the defendant's exceptions to the admission of evidence and all the exceptions to the master's report except one, the fifth, relating to a finding by the master that the defendant was "estopped to deny the existence of Smith Street from the plaintiff's lot in a straight line to the old cider mill and thence out to Prospect Street" which it sustained, and "upon all the facts set forth in the master's report and in accordance with the decision of *Washburn* v. *Miller*, 117 Mass. 376," ruled that upon the defences set up in the eighth and ninth sections of the answer (the objections in the nature of a demurrer) the defendant was entitled to a decree and ordered the bill to be dismissed with costs. Both parties appealed, but the defendant has not pressed his appeal, and we regard it as waived. Lest however we may

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have misconceived the defendant's position in regard to his appeal, we add that we discover no error in the overruling of the defendant's exceptions. But we think that the judge erred in ruling that the defendant was entitled to avail himself of the objection to the maintenance of the bill set up in the eighth and ninth sections of the answer, and in sustaining the fifth exception to the master's report, and in dismissing the bill.

By proceeding without objection in a hearing on the merits before the master, the defendant must be taken to have waived the allegations in his answer that the plaintiff had a plain and adequate remedy at law, and that the bill did not state a case that entitled him to relief in equity. *Parker* v. *Nickerson*, 137 Mass. 487.

Moreover, we think that the remedy at law is not adequate and that the bill states a case for relief. The case is one of continuing interference with the plaintiff's right of passage over Smith Street, and not as in *Washburn* v. *Miller*, 117 Mass. 376, a case of past trespasses and therefore presents a case for equitable relief. *Cobb* v. *Massachusetts Chemical Co.* 179 Mass. 423. *Boston & Maine Railroad* v. *Sullivan*, 177 Mass. 230. It is true that the plaintiff could have brought an action at law, but the remedy would not have been as practical and efficient as in equity and therefore not adequate. *Nathan* v. *Nathan*, 166 Mass. 294.

The defendant does not contend and could not successfully contend that he is not estopped by the boundary in the deed to deny that there was a street called Smith Street over which the plaintiff had a right of passage. The only question would seem to be, therefore, how far Smith Street extended at the date of the plaintiff's deed. This was a question of fact to be determined like any other question of fact by competent evidence.

Such evidence is not confined to plans with lines upon them indicating the street and its connections, nor to showing the limits of the street by fences or other similar structures. The extent of the street may be shown as in the present case by use, by what was commonly known and called Smith Street and by the acts and declarations in regard to it of the owner of the land over which it is contended that it passes. The defendant con-

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tended that the way extended only to the brow of the hill. But the master has found that when the plaintiff took his deed Smith Street extended to Prospect Street along the line contended for by the plaintiff. He has also found that this was what was commonly known as Smith Street, and that while it did not appear on any recorded plan or on any plan it did appear on the surface of the ground and was the only street or road to which that name could apply, and there was nothing to indicate where any portion of it that might be distinctively called Smith Street should end and the rest considered merely as a farm road except that the street was worked to a width of forty-two feet east to the brow of the hill and only to a width of ten or twelve feet from that point to Prospect Street. The master has further found that the name of Smith Street was given to this street by the defendant, meaning, as we construe the report, to the street out to Prospect Street, and that the defendant represented to the plaintiff and other parties that it was his intention to make this street a main thoroughfare leading out to Prospect Street, and that he did work upon the street in fitting it for travel. These and other findings by the master as to the extent to which the street was used were well warranted by the evidence, and we think that the master was right in finding and ruling as he did that the defendant was estopped to deny that Smith Street extended from the plaintiff's lot to Prospect Street.

The result is that we think that the decree dismissing the bill should be reversed and a decree entered for the plaintiff with costs.

So ordered.

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JOHN BRADY *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Hampden. September 22, 1903. — October 20, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Negligence, Employer's liability. *Railroad. Evidence.*

In an action by a car inspector employed in a freight yard of the defendant, for injuries alleged to have been caused by the negligence of the defendant's superintendent or of a person in charge and control of a train of the defendant, it appeared, that the defendant's yard master was the only person who controlled the switching of trains in the yard, and, although he had no right to order a car to be moved until the train of which it was a part had been inspected by the plaintiff, any order from him to the switching crew would be obeyed whether the inspection had been completed or not, and that, while the plaintiff in the course of his duty as inspector was repairing a car, the yard master caused six or seven cars, which had formed part of the same train, to be moved forcibly against the car which the plaintiff was repairing, so that it knocked him down and ran over him. *Held*, that there was evidence that the yard master was a superintendent exercising superintendence within the employers' liability act, and that he also was a person in charge or control of a train.

In an action by a car inspector employed at night in a freight yard against the railroad company employing him, for injuries received while the plaintiff was at work repairing a car, from other cars being moved forcibly against it by order of the defendant's superintendent, the fact that the plaintiff had not placed a blue signal upon the car on which he was working, as required by a rule issued by the defendant, does not as matter of law constitute contributory negligence on his part, if there is evidence on which the jury can find that the defendant had acquiesced in an abandonment of the rule, and that the plaintiff, although he knew of the promulgation and assertion of the rule, properly might assume that it was no longer in force.

In an action by a car inspector employed in a freight yard against the railroad company employing him, for injuries received while the plaintiff was at work repairing a car, from other cars being moved forcibly against it by order of the defendant's superintendent, the plaintiff may show, upon the issues of his due care and the defendant's negligence, that, three weeks before the accident, a train on which the plaintiff was at work making repairs was moved before the repairs were finished, and that the superintendent then promised the plaintiff, that thereafter he would not order any car to be moved under such circumstances until after the plaintiff had notified him that the repairs had been completed.

In an action by a car inspector employed in a freight yard against the railroad company employing him, for injuries received while the plaintiff was at work repairing a car, from other cars being moved forcibly against it by order of the defendant's superintendent, the plaintiff, upon the issue of the negligence of

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the superintendent, may introduce evidence to show that under the circumstances so many cars, as were run against the one on which the plaintiff was working, could not be sent down properly with only one brakeman upon them.

TORT, under St. 1887, c. 270, for injuries received by the plaintiff while at work in the freight yard of the defendant at Westfield. Writ dated September 23, 1901.

At the trial in the Superior Court before *Fox*, J., the jury returned a verdict for the plaintiff in the sum of $4,000; and the defendant alleged exceptions.

W. S. Robinson, for the defendant.

W. H. McClintock, for the plaintiff.

BARKER, J. The plaintiff was a car inspector employed at night in the defendant's Westfield yard. It was his duty upon the arrival of a train to inspect all its cars. If he found a car defective, it was his duty to repair it where it stood, if possible; otherwise to have it set out from the train. His tour of work was from six o'clock in the afternoon until seven o'clock the next morning. During this time ten to thirteen freight trains came in, each composed of from thirty to thirty-five cars. About one o'clock in the night of August 16, 1901, two freight trains entered the yard in close succession, each containing cars to be inspected and shifted in the yard. The engines which drew in these trains were at once detached and taken to the round house leaving the cars standing in the yard on two separate tracks. The cars thus left standing were thenceforth in the charge of one Horrigan the conductor of the yard or yard master, and were not to be moved without his direction. For the purpose of moving them there was a switching engine with its engineer and fireman and a switching crew all of whom were under Horrigan's orders.

Upon the arrival of a train the inspection of its cars was the first thing to be done, and Horrigan had no right in the proper discharge of his duty to cause any car to be moved until the train in which it was had been inspected; but he in fact had the power to cause any of the cars to be moved as he might order, whether the inspection of the train had or had not been completed.

Upon the arrival of the two trains it was known both to Horrigan and the plaintiff that one of them had broken in two

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and that some repairs to a car which stood next to the place where the broken train was parted would have to be made by the plaintiff.

He ascertained from Horrigan that the latter desired to deal first with the other train, and proceeded to inspect that train. When that inspection was completed he proceeded to inspect the broken train and to repair the defective car where it stood. In the meantime Horrigan by means of the switching engine and crew was dealing with the first train. Having finished with that train he then began to deal with the cars of the second train and so caused six or seven of its cars to be moved forcibly against the defective car which the plaintiff then was repairing and which knocked him down and ran over him.

The case was left to the jury upon the third count upon the issue whether the plaintiff's injury was due to the negligence of Horrigan as a superintendent, and upon the fifth count upon the issue whether the injury was due to the negligence of Horrigan while in charge and control of a train.

After a verdict for the plaintiff the case is here upon the defendant's exceptions, which were to the admission of evidence, to the refusal to give certain instructions requested, and to "the instructions given to the jury not in harmony with the defendant's requests."

1. The defendant contends that Horrigan was neither a superintendent nor a person in charge or control of a train, for whose negligence the plaintiff can recover.

There was evidence tending to show that the department of inspection was distinct from that in which Horrigan and the switching crew were employed, and that the plaintiff was not under Horrigan's orders, and that the latter had no right to order a car to be moved until the train of which it was a part had been inspected by the plaintiff. Assuming all these things as facts of the situation yet the jury could find that Horrigan in his capacity as conductor of the yard or yard master was in fact a person and the only person who had the right to control, and who by his orders to the switching crew did control, and cause, all the moving of cars in the yard; and that any order from him to the switching crew to move a car or cars was to be obeyed, and was obeyed, regardless of whether the inspection of the

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train had been completed or not. The switching crew acted upon his orders, and upon his orders only, and he gave and they obeyed the order in the execution of which the cars were let down against the car upon which the plaintiff was making repairs. Although Horrigan was not upon those cars, and a brakeman was upon them, and although the plaintiff was not at work under Horrigan but in a distinct department of the defendant's service, we think that Horrigan was within the meaning of the employers' liability act a superintendent exercising superintendency in ordering the letting down of the cars, and also a person in charge or control of the train. This is because all that was done or was to be done as to moving the cars was done and was to be done solely under his direct order and supervision.

2. Another contention of the defendant arises from the facts that on May 21, 1899, the defendant had issued a rule contemplating the placing of a blue signal on or at the end of a car, engine or train under or about which workmen are at work, and that on September 27, 1900, and December 3, 1900, circular letters were issued calling attention to the rule, and that copies of these rules and circulars were in and about the yard and known to the plaintiff, and that he had placed no such signal to protect the car which he was repairing, but relied only upon the fact that Horrigan knew that the plaintiff was to repair the car where it stood, and that Horrigan had in effect promised not to cause any of the cars to be moved until the plaintiff had notified him that the repairs had been completed.

The defendant asked an instruction that upon all the evidence the plaintiff was guilty of contributory negligence in failing to observe the rule with reference to blue signals. This was not given and the jury were allowed to find whether the rule was at the time of the accident a rule of the company in force as such, and a practicable rule which could and should have been regarded by the plaintiff at that time, or whether the defendant understood that it had become a dead letter and had acquiesced in its abandonment.

While the question is somewhat close we cannot hold that the presiding judge was wrong in allowing the jury to find an abandonment of the rule by the defendant. Long continued practice

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to the contrary of what is prescribed by such a rule, it is held, may have the effect to show that the rule is superseded or waived or abandoned. *McNee* v. *Coburn Trolley Track Co.* 170 Mass. 283, 285, and cases cited. *Sweetland* v. *Lynn & Boston Railroad*, 177 Mass. 574, 579. *Boyle* v. *Columbian Fire Proofing Co.* 182 Mass. 93, 98.

In the present instance there was abundant evidence tending to show that the rule had been disregarded constantly in the Westfield yard. That yard was substantially in the centre of an important transportation system and was a point where all cars were inspected whenever brought into it. It is apparent that circumstances to which the rule would apply and in which it must be either followed or disregarded must have been of almost constant occurrence in the yard. The jury could have found that it had always been disregarded there and that no action had been taken by the defendant for the enforcement of the rule by disciplining those who did not comply with it, and no action whatever with reference to it for more than eight months next before the date of the plaintiff's injury.

In addition to this the jury could have found that it was difficult to comply with the rule, which when repairs were to be made upon a car forming a part of a train would compel the repairer to place a signal at each end of the train and to remove the signals upon the completion of his work. The defendant's officers might well be presumed to know the habitual conduct of its employees in such an important yard. *Sweetland* v. *Lynn & Boston Railroad, ubi supra.* The jury might find also that although the plaintiff knew of the previous promulgation and assertions of the rule he properly might assume that its force had ceased. *McNee* v. *Coburn Trolley Track Co., ubi supra.*

3. The considerations stated show that the defendant's requests so far as they were not given were refused rightly, and the exception to the charge was general as not in harmony with the requests. The other exceptions were to the admission of evidence. Of these several were to the admission of a conversation which took place between the plaintiff and Horrigan in the yard in the presence of the switching crew about three weeks before the time when the plaintiff was hurt. The evidence admitted tended to show that, cars having been moved

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in a train on which the plaintiff was at work making repairs before he had finished his repairs, Horrigan promised that thereafter he would not order any car to be moved under such circumstances until after the plaintiff should have notified him that the repairs were completed. The defendant contends that this evidence should have been excluded because not competent to show an abandonment by the defendant of the rule mentioned as to the placing of blue signals. But the evidence was competent upon the questions of the plaintiff's due care, and of Horrigan's negligence.

The other exceptions of this class were to evidence upon the question whether under the circumstances in which Horrigan caused the cars which collided with the one on which the plaintiff was at work to be sent down upon it by the switching crew so many cars as he sent could be sent properly with only one brakeman upon them. The evidence seems in the actual aspect of the case as disclosed by the bill of exceptions to have been of very little if any importance. But we cannot say that it was not competent upon the question of Horrigan's due care or negligence in sending down the cars which came against the one on which the plaintiff was at work.

Exceptions overruled.

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THOMAS JOYCE *vs.* AMERICAN WRITING PAPER COMPANY.

Hampden. September 22, 1903. — October 20, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Negligence, Employer's liability.

A boy fifteen years of age employed in a paper mill was ordered by a superintendent to go to work on a duster, a machine for beating dust out of rags, and to do as a certain workman did. The boy saw this workman, when the opening in a cylinder of the machine got clogged with rags, knock them out with a stick, and, on his attempting to do the same thing, his arm was injured by the spikes of a rapidly revolving drum within the cylinder. In an action against his employer for this injury, there was evidence that the plaintiff was not cautioned in regard to the danger or told what was behind the opening, and that when the drum was in motion a person in front of the machine could not see what was behind the opening. *Held*, that there was evidence of the defendant's negligence and

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of the plaintiff's due care, and that the risk was not an obvious one which the plaintiff assumed.

A boy of fifteen employed in a paper mill, who once has helped to clean out one of the six cylinders of a machine for beating dust out of rags, which are alike on the outside, is not thereby chargeable with knowledge of the interior of another of the cylinders, containing a revolving drum with a spiral line of spikes on it, from which he suffers injury.

TORT, by a minor employed in the paper mill of the defendant, for personal injuries caused by the plaintiff's arm being struck by the spikes upon the rear drum of a spike duster, a machine for beating dust out of rags, alleging negligence of the defendant in failing to instruct or warn the plaintiff concerning the dangers of his employment, and negligence of the defendant's superintendent. Writ dated July 9, 1902.

At the trial in the Superior Court before *Maynard*, J., the jury returned a verdict for the plaintiff in the sum of $800; and the defendant alleged exceptions.

W. Hamilton, (*W. H. Brooks* with him,) for the defendant.

C. T. Callahan, for the plaintiff.

LORING, J. In this case the jury were warranted in finding that these were the facts. The plaintiff was a boy in his sixteenth year. He left school in the beginning of January and went to work in an alpaca factory, setting bobbins on spindles on spinning frames. After working there two months, he was employed by the defendant and set to work in the rag room, where he had nothing to do with machinery. After working there about two weeks, he was put to work in the duster room and after working there a day and a half he went back to the rag room for half a day, then returned to the duster room, and on the third day thereafter the accident complained of happened.

His duty in the duster room was to collect the rags in a box as they came out of a railroad spike duster, and to carry them to a hole in the floor where another employee stowed them in a boiler. This railroad duster consists of six cylinders placed in a row with the axes parallel with each other and with the floor of the room. Under the cover of each cylinder is a revolving drum, on the face of which is set a spiral row of spikes about three inches long. These spikes are about one inch in diameter at the base where they are set on the face of the drum, and taper to half an inch at the point. The drums revolve rapidly, mak-

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ing one hundred to one hundred and twenty-five revolutions a minute. The rags are carried forward from one drum to another, and are delivered through an opening in the covering of the rear drum into one of two boxes, which it was the duty of the plaintiff and another man or boy to have in place for the purpose. The opening through which the rags were delivered into the box was the entire length of the cylinder; the lower edge was formed by a beam, and the upper edge by a board nailed on the outside frame, making the side of the cylinder and being the last board of the cylindrical cover of the drum in question. The opening was an opening of about seven inches, extending the length of the cylinder, namely, three feet; and there was evidence that at the time of the accident a piece of canvas, three or three and a half inches long, was hung across the top edge of the hole, leaving below the canvas an opening of three to four inches. The opening was about on a level with the plaintiff's ears. Ordinarily the rags were delivered into the box set to receive them by the revolution of the drum which revolved up and away from a person facing the opening. The plaintiff testified that Batchelor, who was his superintendent, told him to go to work on the duster and to do as the Polander did who was working there; that when this opening got clogged with rags the Polander with a stick knocked them out into the box set to receive them. He also testified that at the time of the accident he was standing on one side of the opening, and that he reached across with his stick about three feet long, which he held in the middle, to push away some rags which had collected on the other side of the opening. He gave several accounts of the way the accident happened. He said on direct examination that "the stick got caught and pulled my arm into the machine; I don't know exactly how my arm got in there; I did not put my hand in there voluntarily." On cross-examination he said: "I don't know whether the stick got caught or not; I don't know how I got my arm in there; I was removing from the other side of the machine some rags and I got my arm caught, but I don't know how I got it caught." It is not stated in the bill of exceptions just what the injury to the plaintiff's arm was; the exceptions go no farther than to state that his arm was hurt by coming in contact with the spikes on the rear drum of the duster.

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To take up the defendant's contentions in the order of its brief:

1. We do not think that by reason of the two stories told by the plaintiff the jury were left to guess how the accident occurred.

2. We are not able to say that it was impossible for the plaintiff to have been hurt in one of the ways he testified to. The defendant has argued that the effect of getting the end of the stick caught on a tapering spike which was revolving upward would be to throw the arm of the person holding the stick up and out. But it is to be remembered that this seven inch opening, three or four inches of which was covered by a piece of canvas, was on a level with the plaintiff's ears; that the drum was making one hundred to one hundred and twenty-five revolutions a minute; and that the spikes were set on the drum in a spiral line. We cannot say that these could not have produced such a combination as to have resulted in some injury to the plaintiff's arm from the stick being caught.

3. What distinguishes the case from *Robinska* v. *Lyman Mills*, 174 Mass. 432, and *Chmiel* v. *Thorndike Co.* 182 Mass. 112, in the first place is that the jury were warranted in finding that the plaintiff in the case at bar was doing what he was told to do. He testified that he was told to do as the Polander did, and that the Polander removed the rags with a stick as he was doing. In this respect the case is somewhat like *De Costa* v. *Hargraves Mills*, 170 Mass. 375. In the second place, the plaintiff did not undertake to thrust the stick into the opening in ignorance of what was behind it, but he was trying to remove the rags on the edge of it and the stick was caught.

4. The jury were warranted in finding that the plaintiff was put at work to remove with a stick a glut of rags from a three inch opening in front of a drum with a spiral line of spikes on it, making one hundred to one hundred and twenty-five revolutions a minute, without cautioning him of the danger, or telling him what was behind the opening. On the evidence the jury were warranted in finding that when the drum was in motion a person fronting the machine could not see what was behind the opening. We think that this could be found to be negligence.

5. We do not think that the plaintiff was chargeable with

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knowledge of the interior of the sixth cylinder because he had once helped clean the third cylinder. The fact that the outside of the two cylinders was the same does not fix upon a person knowledge that the interiors were also the same.

6. For the reasons already given, the risk which caused the accident was not an obvious one which the plaintiff assumed.

7. We do not think that the plaintiff was, as matter of law, guilty of contributory negligence because he reached across the machine to remove the rags, in place of going to the other side. He was told to do as the Polander did, and the jury were warranted in finding that it was for that reason that he did not go to the other side.

Exceptions overruled.

EDWIN ALVEY *vs.* AMERICAN WRITING PAPER COMPANY.

Hampden. September 22, 1903. — October 20, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Negligence, Employer's liability.

A master is not liable for an injury to a servant from an obvious danger of his employment, when the servant is permitted to do the work in his own way and can avoid the danger by the exercise of reasonable care.

In an action by a workman in a paper mill for injuries from being struck by the flying up of an iron pipe used to carry steam to a machine called a beater, it appeared, that the pipe that flew up was attached by a loose joint to a vertical pipe connected with the source of the steam, that if steam was applied suddenly it would cause the movable pipe to fly upward, that a workman about to let on the steam could stand in such a position that if the movable pipe flew up he would be out of the way, that a wire had been attached to the lower end of the movable pipe merely for the purpose of moving it when heated by steam, and not for the purpose of fastening it. The plaintiff testified that he had used the wire to lift the hot pipe and had run the beater for five days, during which he had lowered the movable pipe and turned on the steam at least twice on each day, and knew that if he let on the steam too quickly the pipe, if not fastened, would fly up. *Held*, that a verdict rightly was ordered for the defendant; that the plaintiff either appreciated the whole situation, or, if he mistook for a fastening the wire placed on the pipe as a means of raising it, this mistake was negligence on his part, that there was no evidence that the defendant failed in its duty in not providing a fastening, as the appliance could be used safely without one, and that the plaintiff voluntarily stood within the range of the motion of the pipe, if it should fly up, instead of standing where he could not be hit.

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TORT, for injuries received while employed in the paper mill of the defendant, with one count under the employers' liability act, alleging a defect in the ways, works and machinery of the defendant, and two counts at common law alleging negligence on the part of the defendant, respectively, in not furnishing and keeping in repair suitable machinery and appliances, and in furnishing the plaintiff with defective and dangerous tools and machinery. Writ dated May 31, 1901.

At the trial in the Superior Court before *Gaskill*, J., it appeared, in addition to the facts stated in the opinion, that the plaintiff had been in the employ of the defendant for four or five years, working on washers and beaters, that a washer and a beater are different things, and that he went to work on a beater about a year before he was hurt.

At the close of the evidence for the plaintiff, the judge ruled that there was no evidence to warrant submitting the case to the jury, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

T. B. O'Donnell, for the plaintiff.

W. Hamilton, (*W. H. Brooks* with him,) for the defendant.

BARKER, J. The plaintiff was struck and hurt by the flying up of an iron steam pipe used to convey steam into a beater in a paper mill. The object of introducing steam in the beater was to heat the materials which were in it being ground into pulp, and which were in a semifluid state. The pipe which flew up was two feet and nine inches in length and one inch and three-quarters in diameter and was attached by a loose joint at the upper edge of the beater to a similar vertical pipe fastened to the edge of the beater and to the ceiling of the room and connected with the source from which the hot steam was supplied. In this vertical pipe was a valve by which to turn the steam on or off. When the steam was not being applied to the material in the beater the movable pipe rested in a horizontal position on the upper edge of the beater. When steam was to be applied the end of the movable pipe was taken from the edge of the beater and the pipe swung by its own weight into a vertical position within the beater, and with its lower end immersed in the semifluid mass which it was intended to be the means of heating by serving as a conduit for the injection of steam into

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the material which was being ground into paper stock. The opening of the valve in the fixed vertical steam pipe allowed the steam to pass through the movable portion of the pipe into the contents of the beater. There was no appliance designed to hold the movable pipe in a vertical position, and nothing to keep it in such a position except its own weight and the resistance of the semifluid mass in which it was immersed. When about to turn the valve and let on the steam the workman could stand in such a position that if the movable pipe flew up he would be out of its way, or he could so stand that in such case he would be in its way. When the steam was on, the movable pipe became so heated that it could not be handled with safety or comfort, and a wire had been attached to its lower end and carried over the stem of the valve as a means of raising the movable pipe when heated. This wire had no tendency to keep the movable pipe in a vertical position.

The whole apparatus was entirely simple, visible, and easily understood. The only danger in its use was that if steam should be applied suddenly its pressure against the material in which the movable pipe was immersed would cause the movable pipe to swing upward with violence and injure a person with whom it might come in contact.

The evidence at the trial consisted of the testimony of a civil engineer who described and gave the measurements of the beater and its parts and of the room in which it was, of the plaintiff's own testimony and certain plans and exhibits intended to illustrate the beater and its steam connections. At the close of the evidence a verdict was ordered for the defendant and the question raised by the plaintiff's exceptions is whether he should have been allowed to go to the jury upon the case. We think that upon the evidence as it stood there were good reasons why the plaintiff could not recover.

It might be found from his testimony that he thought that the wire running from the end of the movable pipe to the valve stem was designed to keep the movable pipe from flying up. But it is plain that it had no such purpose and that it could not have any such effect. To have supposed that it could have that effect and to have relied upon it as an efficient means of keeping the movable pipe in a vertical position when steam was to be turned

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on was in itself a negligence. The plaintiff testified that he had used the wire to lift up the hot pipe, although he denied that he knew that it was intended solely for that purpose. But the whole apparatus was simple and open to observation, and the plaintiff testified that he had run that particular beater for five days during which he had lowered the movable pipe and turned on the steam at least twice on each day, and that he knew of the power of steam and that if he let on the steam too quickly the pipe if it was not fastened would surely fly up.

If he appreciated the fact that there was no fastening intended to hold the movable arm in a vertical position when steam was to be turned on, he appreciated the whole situation, which was as open and obvious a one as could be to any workman of his experience, and as it could be to his employer. If he mistook for a fastening the wire placed upon the pipe as a means of raising it, that mistake was a negligence and it alone prevented him from fully appreciating a danger which any workman with his knowledge of the power and action of steam would have appreciated at the first, and which he therefore ought not to be permitted to say that he did not appreciate.

Besides this a jury ought not to be permitted to find negligence on the part of the defendant from the evidence as it stood. The appliance of steam to the contents of beaters in the process of paper making seems from the evidence to have been a very recent improvement. The apparatus put in by the defendant was one which when used with care and in the method designed could be used as it was with safety. The plaintiff testified that he knew the proper method to be used which was merely to turn the steam on slowly and not suddenly. To find that the defendant failed in its duty to the plaintiff in not providing a fastening when it was a simple matter so to use the appliances provided that no injury could happen with the apparatus as it was, without a fastening, would be more than a jury ought to be allowed to do upon the evidence as it stood.

Again the plaintiff voluntarily stood within the range of motion of the pipe if it should fly up, although it was entirely feasible for him to have stood in such a position that he could not be hit.

We think the case falls within the general rule "that when

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the danger is obvious, and is of such a nature that it can be appreciated and understood by the servant as well as by the master, or by any one else, and, when the servant has as good an opportunity as the master or as any one else of seeing what the danger is, and is permitted to do his work in his own way, and can avoid the danger by the exercise of reasonable care," the servant cannot recover. *Lothrop* v. *Fitchburg Railroad*, 150 Mass. 423, 424, and cases cited.

Exceptions overruled.

JOSEPH T. LODGE & another *vs.* SAMUEL E. FLETCHER & others.

Hampden. September 22, 1903. — October 20, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Prohibition. Chicopee.

A writ of prohibition cannot be issued to prevent a proceeding which is not judicial.

An investigation by the board of aldermen of the city of Chicopee, of the granting of licenses by the licensing board of that city, is not a judicial proceeding, and consequently a writ of prohibition will not be issued to restrain the aldermen from conducting it.

Under St. 1897, c. 239, the board of aldermen of the city of Chicopee cannot act in a judicial capacity in an investigation of the granting of licenses by the licensing board of that city.

KNOWLTON, C. J. This is a petition for a writ of prohibition to restrain the defendants, members of the board of aldermen of Chicopee, from proceeding with a hearing or investigation of conduct of the petitioners as members of the licensing board of said city, appointed under the provisions of the R. L. c. 100, § 8. The case was heard before a single justice upon the petition, answer, and an agreed statement of facts, and, after ruling that a writ of prohibition should not issue, he reserved the case for the full court. All the averments of matters of fact contained in the pleadings are agreed to be true.

It appears that the board of aldermen passed an order that

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they "enter upon an investigation in reference to the granting of junk dealers' licenses and other matters during this and preceding years," and provided for the summoning of witnesses and the attendance of the city solicitor, and, in the order, gave authority to persons summoned as witnesses to be represented by counsel. The petitioners and many other persons were summoned as witnesses, and the hearing was begun. Numerous affidavits had previously been filed with the board of aldermen, in relation to the granting of licenses to junk dealers, some of them setting forth the payment of money to secure such licenses. Three other affidavits have been filed, referring to conduct of one, at least, of the petitioners, in reference to the granting of liquor licenses. In regard to the investigation as to the granting of junk dealers' licenses no question is made. After testimony had been received in regard to that subject, a witness was asked a question as to liquor licenses, and he refused to answer. Without further action or apparent attempt at action the aldermen adjourned the investigation, and this petition was brought. It appears by the averments of the answer that the respondents never assumed jurisdiction over the petitioners, nor intended to assume such jurisdiction; that no charges were formally preferred against the petitioners or against any officers of the city, although some of the affidavits already referred to implied improper conduct on the part of one or more of them, and no persons were summoned before the aldermen except as witnesses. The respondents "admit that they have no authority to deal directly with, or to take action directly against, or exercise any authority over said petitioners as members of the board of license commissioners, and that they have no authority to compel witnesses to attend and testify before said board relative to any action of said petitioners as members of said board of license commissioners." They aver that it was their privilege and duty, as the only representative legislative body in the city, to receive any evidence which might be voluntarily laid before them that may tend to show misconduct on the part of any officer of the city, to the end that they may take proper action to prevent the continuance of such misconduct, if any is found to exist.

Upon these facts it is plain that the court ought not to issue

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a writ of prohibition. Such a writ can only issue to prevent improper judicial action. It appears that the respondents are not acting judicially, or assuming authority to pronounce any judgment which will affect the rights of anybody. The aldermen of Chicopee, under the charter of the city, are a legislative body constituting the entire legislative department of the city. St. 1897, c. 239, § 2. It can act judicially only for certain specified purposes under the laws. It cannot act judicially in such an investigation as was proposed. There is, therefore, no ground on which the writ can be issued. *Washburn* v. *Phillips*, 2 Met. 296. *Connecticut River Railroad* v. *County Commissioners*, 127 Mass. 50, 58. *Hyde Park* v. *Wiggin*, 157 Mass. 94, 99. *Smith* v. *Whitney*, 116 U. S. 167. *In re Radl*, 86 Wis. 645. *Ex parte Death*, 18 Q. B. 647. *In re Local Government Board*, 16 L. R. (Ir.) 150. How far and with what effect the investigation can proceed upon testimony voluntarily offered, it is not necessary in this case to consider.

Petition dismissed.

C. T. Callahan, for the petitioners.

L. E. Hitchcock, for the respondents.

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JOSEPH H. LODI *vs.* MICHAEL MALONEY & another.

Hampden. September 23, 1903. — October 20, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Negligence, Employer's liability.

In an action by a workman against a contractor by whom he was employed, it appeared, that the plaintiff was one of a gang of men engaged in lowering an iron boiler into a cellar by means of inclined beams, that a wire rope attached to the boiler was held by the men, who were to let it slip slowly around a wooden post as the weight of the boiler lowered it into position, that the rope cut into the post and its motion stopped, that the defendant said to the plaintiff, "The rope is all right. Come around here and slack it. Slack it with your hands", that the plaintiff attempted to loosen the rope with his hands, when it started, and caught his hands, causing the injury. *Held*, that the defendant's order should be construed as an order to the plaintiff to slack the rope with his hands

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in such a manner as should be safe and proper, and that the plaintiff assumed the risk of the obvious danger, which was increased by the position he chose to take in doing the work.

TORT for personal injuries caused while in the employ of the defendants, who were contractors constructing a heating plant at Springfield. Writ dated February 4, 1902.

At the trial in the Superior Court, *Maynard*, J. at the close of the evidence ruled that the plaintiff was not entitled to recover, and ordered a verdict for the defendants. The plaintiff alleged exceptions.

D. E. Leary & E. W. Beattie, Jr., for the plaintiff.

W. H. Brooks & W. Hamilton, for the defendants.

BARKER, J. When the plaintiff, who had had eleven years experience as a hod carrier, was hurt the work in hand was the lowering of a boiler into a cellar. The boiler was twenty or twenty-five feet long and weighed about ten tons. It was to be allowed to slide down inclined beams, its motion being controlled by the manipulation of two wire ropes one of which was fastened around each end of the boiler, and went thence to a wooden post around which it took two or three turns, the other end of the rope being held by a gang of men who were to let the rope slip slowly around the post as the weight of the boiler lowered it into position.

One of the defendants was present overseeing the work and directing the workmen. The plaintiff was in one of the gangs manipulating one of the ropes, his position in the gang being that nearest to the post around which the wire rope of which he had hold was passed. In the lowering process this rope cut into the post and its motion stopped. The plaintiff left his place in the gang and attempted with his hands to loosen the rope. While so engaged the rope started and caught his hands between it and the post. The evidence was conflicting as to whether he made this attempt voluntarily, or in compliance with an order given by that one of the defendants who was present, directing the plaintiff to go and slack the rope with his hands, the order being accompanied with the statement, "It is all right," or "The rope is all right. Come around here and slack it. Slack it with your hands."

As a verdict was ordered for the defendants we assume that

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the plaintiff acted upon an order coupled with a statement that it was all right.

The stakes around which the ropes were passed were only about nine feet from the ends of the boiler. When the lowering began the boiler was at the edge of the cellar. The whole situation was open, the apparatus used was simple, and the plaintiff was so placed as to have a perfect opportunity to know and appreciate how the work went on and what dangers attended it, and to control absolutely his own motions in whatever share of the work he attempted to perform.

The order, if given, as we assume, was in substance that the plaintiff should slack the rope by getting it out of the cut which it had made in the post. It was obvious that as soon as this should be done the constantly acting weight of the boiler would tend to pull the rope forward and to carry the hands, if near enough to the post, between the rope and the post. In attempting to comply with the order the plaintiff had liberty to choose and chose his own position. The order did not tell him to hurry nor dictate to him where he should take hold of the rope, and it fairly cannot be construed except as an order to slack the rope with his hands, acting in such a manner as should be safe and proper. Where he should place his hands and how he should work with them was left to his own choice.

We are of opinion that the evidence would not justify a finding of negligence on the part of the employer, or of due care on the part of the plaintiff, and that the latter cannot recover for the results of a risk which turned against him because of the position which he chose to assume in doing a work the general danger of which was obvious, and the degree of which varied with the position which the plaintiff chose to take. He certainly had as good an opportunity as his master of ascertaining and obviating the danger for himself. *Haley* v. *Case*, 142 Mass. 316, 322. *Linch* v. *Sagamore Manuf. Co.* 143 Mass. 206. The order did not contain an injunction to hurry, and the danger was obvious and one growing naturally out of the work in hand, thus differentiating the case from that of *Millard* v. *West End Street Railway*, 173 Mass. 512, cited for the plaintiff.

Exceptions overruled.

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EDWARD W. ARKLAND *vs.* TABER-PRANG ART COMPANY.

Hampden. September 23, 1903. — October 20, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Negligence, Employer's liability.

In an action by a workman in a picture frame factory against his employer, for the loss of his arm cut by a band saw, it appeared, that the plaintiff was twenty-seven years of age, had worked for six years about wood working machines, and knew what a band saw was, although he had never worked on one, that, on the first day of his employment by the defendant, by direction of the foreman he had marked out some patterns on wood and had taken them to the man who was working the band saw, when in laying them down on the table, through which the band saw passed, his arm came in contact with it, and he was injured. *Held*, that the danger of getting hurt if he came in contact with the band saw was a risk incident to the plaintiff's employment which he assumed, and that the defendant owed the plaintiff no duty to guard the saw or to change its position, and had no reason to suppose that the plaintiff needed any warning or instruction in regard to it. *Semble*, that the plaintiff was not in the exercise of due care.

TORT by a workman in a picture frame factory for the loss of his arm by coming in contact with a band saw, with counts respectively alleging failure to furnish the plaintiff with a safe and suitable place to work, failure to warn the plaintiff of the dangers of his employment, negligence of the defendant's superintendent, and a defect in the defendant's ways, works and machinery. Writ dated August 26, 1901.

In the Superior Court the case was tried before *Fox*, J. At the close of the plaintiff's evidence, the judge ruled that there was no evidence on which the case should be submitted to the jury, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

The band saw in this case consisted of an endless steel band from one quarter to three eighths of an inch wide, having saw teeth on one edge, running over two large wheels, one some distance above the working table and the other beneath it, the band passing through a slot in the table.

A. L. Green, for the plaintiff.

W. Hamilton, (*W. H. Brooks* with him,) for the defendant.

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MORTON, J. This is an action for personal injuries, the loss of an arm, while in the defendant's employ. At the close of the plaintiff's evidence the judge directed a verdict for the defendant, and the case is here on exceptions to this ruling. Exceptions were also taken to the exclusion of certain questions, but they have not been pressed and we therefore treat them as waived. We think that the ruling was right.

The plaintiff entered the defendant's employ on the morning of the day on which he was injured. He was set to work on a machine called a shaper, shaping picture frames. This machine was situated near a band saw. He finished that job and was then told by the foreman to mark out some patterns on wood and when he had marked out the required number was directed by the foreman to take them to a Mr. Sanderson who was working at the band saw. He did so and in some way in laying them down on the table of the band saw, his arm came in contact with the band saw and he received the injury complained of. He was twenty-seven years of age and testified on direct examination that he "had worked around wood-working machines, shapers, and so on" and on cross-examination that he "had worked about wood-working machinery about six years in all." He knew what a band saw was though he had never worked on one, and was not familiar with band saws.

When the plaintiff entered the defendant's employ he assumed the obvious risks incident to it, and the danger of getting hurt if he came in contact with the band saw was one of them. The defendant owed him no duty to fence or guard the band saw, or to change its position with reference to that of the shaper on which he was set to work. *Stuart* v. *West End Street Railway*, 163 Mass. 391. *Hale* v. *Cheney*, 159 Mass. 268. The defendant had no reason to suppose that the plaintiff needed any warning or instruction in reference to the danger of injury from coming in contact with the band saw and therefore was not negligent in failing to warn the plaintiff of the danger. For aught that appears the plaintiff was at least of average intelligence, and, as he told the defendant's superintendent, had worked about wood-working machines, shapers and so on though he had never operated a band saw. He was an experienced workman who had been employed amongst wood-working machinery and

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there was nothing in his previous history or age to show the defendant that he required any warning or instruction in regard to the band saw. Sanderson was at work at the band saw when the plaintiff laid down the patterns on the table, and the accident would seem to have been due to inattention on the plaintiff's part to the proximity of the saw; in other words to a want of due care on his part.

The result is that the exceptions must be overruled.

So ordered.

MARY MANNING *vs.* CITY OF SPRINGFIELD.

Hampden. September 23, 1903. — October 20, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Municipal Corporations.

A city is not liable for damage caused by the insufficiency of its system of sewers.

TORT, by the owner of certain real estate on Ferry Street in Springfield, against that city for damages alleged to have been caused by the defective construction and improper maintenance and operation of the sewer in Ferry Street and the pipes and drains connecting therewith. Writ dated March 15, 1901.

In the Superior Court *Mason*, C. J. ruled that the action could not be maintained and ordered a verdict for the defendant. The plaintiff alleged exceptions.

J. L. Doherty & W. G. Brownson, for the plaintiff.

H. A. King, for the defendant.

KNOWLTON, C. J. This is an action of tort to recover for injuries to the plaintiff's real estate from water that came in upon it on two occasions, through the drain pipe connected with the sewer, and from the street, proceeding from the sewer out through a manhole in front of the plaintiff's house. The drain pipe had an opening into the plaintiff's yard which was considerably below the level of the street, and into two sinks in the

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lower tenements of the building. The plaintiff's drain had been connected with the sewer since 1878 or 1879, but no water had ever come back through it until these occasions, the first of which was in March, 1901. At these times there was, for a few hours, a very heavy fall of rain, — some of the witnesses said heavier than had ever been known before. The ground was then frozen, and the sewers all over the city were heavily charged with water. There was no evidence that the sewer in front of the plaintiff's house, or the sewers connected with it, were defective in construction, or obstructed or out of repair, and there was no evidence that any of these sewers was authorized or established, otherwise than by tribunals whose members acted as public officers under the statutes. The evidence all tended to show that the defect in the sewers, if there was a defect, was in the system, which did not carry off immediately so great and rapid an accumulation of surface water as came at these times.

For this system the city in its corporate capacity was not responsible, for it was established by officers acting judicially under the authority of law. It has often been decided that, for faults or imperfections in its system of sewers, a city or town is not liable, although it is liable for negligence in the work of construction, or in the maintenance or repair of sewers. *Child* v. *Boston*, 4 Allen, 41. *Merrifield* v. *Worcester*, 110 Mass. 216, 221. *Buckley* v. *New Bedford*, 155 Mass. 64. *O'Brien* v. *Worcester*, 172 Mass. 348, 353. *Hewett* v. *Canton*, 182 Mass. 220, 224. *Johnston* v. *District of Columbia*, 118 U. S. 19. Under this rule, upon the evidence before the court, the presiding judge rightly directed a verdict for the defendant.

Exceptions overruled.

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WILLIAM F. COOK *vs.* CITY OF SPRINGFIELD.

Hampden. September 23, 1903. — October 20, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Municipal Corporations. Contract. License Commissioner.

A city, appointing a license commissioner under St. 1894, c. 428, does not employ him, and incurs no obligation to pay a reasonable compensation for his services. Its only obligation in regard to his compensation is imposed by § 6 of that statute, which requires each city to pay its license commissioners such salaries as the city council shall establish.

CONTRACT, on a *quantum meruit*, to recover $5,500 for services alleged to have been rendered to the defendant as license commissioner from June 1, 1896, to December 1, 1901. Writ dated March 21, 1902.

At the trial in the Superior Court before *Lawton*, J., the defendant tendered to the plaintiff compensation for his services at the rate of $5 a year, pursuant to the order of the city council mentioned in the opinion, with the plaintiff's costs to the time of the tender. The tender was declined. Thereupon the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

A. S. Hayes, (*A. G. Sleeper* with him,) for the plaintiff.

H. A. King, for the defendant, was not called upon.

LORING, J. The plaintiff was a license commissioner of the city of Springfield under St. 1894, c. 428, for a term beginning June 1, 1896, and ending May 31, 1902. By § 6 of that act it is provided that "Each city shall pay its board of license commissioners such salaries as the city council, subject to the approval of the mayor, may from time to time establish," and it is conceded that under that act the license commissioners were to be paid and were not to serve gratuitously.

In October, 1894, nearly two years before the plaintiff's term of office began, the city council of Springfield passed an order that the compensation of the chairman should be $250 a year, and that the other two members of the board should serve without compensation.

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In January, 1897, that is to say, in the January succeeding the June when the plaintiff's term of office began, he and his fellow commissioners petitioned the city council to increase the salary of the chairman, and that a salary be paid to the other members of the board, on which the petitioners were given leave to withdraw. A like petition was made by them in April, 1900, with the same result.

In June, 1900, the plaintiff was appointed chairman and secretary of the board, and served as such during the remainder of his term; and for the time during which he has served as chairman he has received compensation at the rate of $250 per annum, but he has received no other compensation.

On November 18, 1901, the plaintiff petitioned the city council "to take such action as will result in paying him the annexed bill of $5,000 for services as a member of the board of license commissioners from January 1, 1896, to June 1, 1901, said bill being at the rate of $1,000 per year." On this he was given leave to withdraw.

On December 23, 1901, the city council passed an order fixing the compensation of the member of the board who acted as chairman and secretary at the rate of $250 a year, and the compensation of the other two members at the rate of $5 per annum, these salaries to be the compensation for services rendered from July 2, 1894, to December 31, 1901.

On March 21, 1902, the plaintiff brought this action against the city, to recover the reasonable value of his services as license commissioner from the beginning of his term to December 1, 1901, outside of his service as chairman and secretary; and he testified that these services were reasonably worth $5,500, being at the rate of $1,000 a year. The plaintiff also testified to the character of the services rendered by him and that he estimated that he devoted seventy-five days each year to the work. The defendant tendered the plaintiff compensation at the rate of $5 per annum, with costs. This was declined. A verdict was ordered for the defendant, and the case is here on an exception to that ruling.

What this court said of assessors in *Walker* v. *Cook*, 129 Mass. 577, 578, is true of license commissioners. In that case Endicott, J. said: "The assessors, therefore, are public officers, in the performance of whose duties the whole community has an

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interest. Towns have no authority to direct or control them, but all their powers and duties are prescribed and regulated by statute; and, in case they do not perform their duties, the town has no remedy against them. They are not, in any sense, the agents or servants of the town, and the town, by the election of assessors, enters into no contract with them for the payment of their services."

The plaintiff was not employed by the defendant city, and has not rendered service at its request for which it has come under a contract, as in the case of a city engineer. *Chase* v. *Lowell*, 7 Gray, 33. See in addition to *Walker* v. *Cook*, 129 Mass. 577, *Sikes* v. *Hatfield*, 13 Gray, 347; *Farnsworth* v. *Melrose*, 122 Mass. 268.

The plaintiff has been appointed to a public office, which, by an act of the Legislature, is to be filled by an appointment of the mayor of the defendant city, and whose compensation the Legislature has directed the city council of the defendant city to fix and the defendant city to pay. If that compensation is not fixed the law would issue its writ of mandamus requiring the city council to perform its duty and fix it, *Attorney General* v. *Lawrence*, 111 Mass. 90, *Attorney General* v. *Boston*, 123 Mass. 460, and when fixed, if it was not paid the law would give the public officer an action to recover it, not by reason of a contract express or implied in fact between the plaintiff and the city, but by reason of the statute which makes it its duty to make the payment. *Walker* v. *Cook*, 129 Mass. 577, 579.

The plaintiff's contention comes to this: Where a public office is created and the compensation to be paid for services rendered by the incumbent of the office is to be fixed by a public body, the omission of that body to perform its duty transfers that duty to the court. It is hardly necessary to say that this is not so.

Exceptions overruled.

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EMERY BOURBONNAIS *vs.* WEST BOYLSTON MANUFACTURING COMPANY.

BENJAMIN D. KELLY *vs.* SAME.

Hampden. September 23, 1903. — October 20, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Negligence, Employer's liability. *Evidence*, Competency, Remoteness.

In actions by two carpenters for injuries alleged to have been caused by their being set to work by the defendant's superintendent upon an unsafe temporary staging, constructed in an elevator well in a mill building, there was evidence, that one upright of the staging was fastened insecurely, and that two braces which at first had been used to keep it in place had been removed before the accident, that the staging was built by a superintendent of the defendant, for another job for which it had been used successfully as the plaintiffs knew, that another superintendent in effect told the plaintiffs to use the staging in doing their work and was at one time on the staging while the work was going on and knew that the plaintiffs were using it, that neither the superintendent who caused the staging to be built, nor the one who ordered them to work upon it or saw them at work there, had inspected the staging at any time since its completion. The staging fell while the plaintiffs were at work upon it and they were injured. *Held*, that whether the superintendents were negligent in furnishing the staging, and in directing or allowing the plaintiffs to use it, and whether the plaintiffs were in the exercise of due care, were questions of fact for the jury.

In an action by a carpenter for injuries caused by the fall of a temporary staging built in an elevator well, there was conflicting evidence as to whether one of the uprights of the staging rested on brickwork. An expert was allowed to testify, that to build such a staging with one corner resting on a brick ledge was not a proper construction, also to give his reasons for this opinion and to testify as to the tendency of a brick ledge to loosen under pressure. *Held*, that there was no error in the admission of this evidence, and that it was not necessary for the judge to exclude it because the questions did not contain a statement as to the whole construction of the staging.

In an action by a carpenter against his employer for injuries caused by the fall of a staging, evidence of a custom among carpenters, to make an examination of a staging to see whether it is in proper condition before going upon it, is not competent upon the issue of the plaintiff's due care without showing that the plaintiff knew of the custom. Whether if such knowledge were shown the evidence would be competent was not passed upon.

TWO ACTIONS OF TORT, by carpenters against their employer, for personal injuries alleged, among other things, to have been caused by the negligence of a superintendent of the defendant in setting the plaintiffs to work upon an unsafe staging, that

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being the substance of the count and specification on which each case was submitted to the jury. Writs dated November 16, 1899.

In the Superior Court the cases were tried together before *Maynard*, J. The jury returned a verdict for Bourbonnais in the sum of $3,300, and for Kelly in the sum of $800. The defendant alleged exceptions, which are described by the court.

W. Hamilton, for the defendant.

F. F. Bennett, (*A. L. Green* with him,) for the plaintiffs.

BARKER, J. The plaintiffs were together upon a staging at work when it fell precipitating them from the third story to the bottom of a tower. The general work going on was the repair and renovation of a mill building, and some fifty or sixty workmen were employed among whom were several gangs of carpenters, as well as millwrights, masons, painters and plumbers. The plaintiffs were carpenters and when the accident occurred were engaged in enlarging an old elevator opening in the fourth floor of the tower and in fitting the opening for a new and larger elevator which was to be put in. The staging consisted of uprights, most of which rested on the third floor of the tower and rose to within three or four feet of the fourth floor and of braces to hold the uprights in place, and of plates nailed to the tops of the uprights, and planks forming the top or floor of the staging. It occupied the whole of one side of the third floor of the tower, the elevator opening through the third floor being under the staging and that through the fourth floor being over the top or floor of the staging. Two of the uprights were in corners of the third floor room of the tower, one in the northeast corner and one in the southeast corner. The upright in the northeast corner fell down the elevator opening which was in that corner of the room, thus letting down the flooring of the staging on which the plaintiffs were at work. There was evidence tending to show that the foot of this upright rested upon brick and was insecurely fastened, and that two braces which at first had been put to keep it in place had been removed after the construction of the staging and before the accident. The cases went to the jury upon one count only of each declaration, which counts alleged negligence of a superintendent, the plaintiffs contending that the negligence consisted in setting them to work in an

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unsafe place. It is now admitted that there was evidence which would justify a finding that the two men whom the plaintiffs contended were superintendents were such within the meaning of the employers' liability acts. The cases had been tried once before and there was a conflict of evidence upon many matters involved.

The defendant requested that verdicts in its favor should be ordered upon a variety of grounds, and also requested instructions upon different aspects of the case. The judge refused to order verdicts for the defendant, and gave the jury full and complete general instructions on the questions of due care, assumption of risk and other matters to which no exceptions were taken, and refused to give the rulings requested either in form or substance except as appears from a part of the charge stated in the bill of exceptions. The defendant excepted to the refusal to give the rulings requested and to the rulings given in so far as they varied and were inconsistent with the rulings requested, but pointed out no particulars in which the charge had varied from or was inconsistent with the rulings requested. The bill also states some exceptions upon questions of evidence.

It is not contended that the staging was one constructed by workmen who were set to do a piece of work which involved the necessity of having a staging and who accordingly built it for themselves. On the other hand the staging was built to enable a special piece of work to be done, and was ordered by one of the superintendents and built by two workmen under his supervision before he proceeded to have done the special job for which the staging was ordered. This was the removal from the fourth story of the tower of the drum by which the old elevator was operated. The drum weighed six or seven hundred pounds and in course of removal was handled by five men whose weight with that of the drum had been upheld by the staging. This was about a fortnight before the plaintiffs were hurt, and in the meantime the staging had also been used in taking out a heavy beam which supported the fourth floor of the tower and in levelling or lowering that floor. Nor was the staging such an appliance as would have been put up by the plaintiffs or by any other workmen in order to enable them to do the work of enlarging and fitting the elevator openings. The evidence would justify

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a finding that while the plaintiffs had no part in building the staging they did know that it had been caused to be erected by one of the superintendents for the work of removing the drum, and that it had been successfully used in doing that work, and subsequently in removing the beam and levelling the floor above and then allowed to remain as if for further use. We think it might be found also from the evidence that the plaintiffs were in effect though not in express words told by a superintendent to use the staging in doing their work, and also that this superintendent was at one time on the staging when that work was going on and knew that they were using it, and that neither the superintendent who had caused the staging to be built, nor the one who ordered them to work upon it or saw them at work upon it had inspected it at any time since its completion.

Under such circumstances we think it was open for the jury to find that the staging was furnished by the defendant through its superintendents as a completed structure or appliance for the use of the plaintiffs in the particular work of enlarging and fitting the elevator opening in the fourth floor; and that the questions whether the superintendents were negligent in furnishing the staging, in not inspecting it before allowing the plaintiffs to use it, and in directing or allowing the plaintiffs to use it, and also the question whether the plaintiffs were in the exercise of due care in working upon it were all questions of fact for the jury.

This requires us to overrule the exceptions to the refusal to give the first, second, third, fourth, fifth, sixth and seventh requests and to the charge so far as it was not consistent with them.

As to the thirteenth, fourteenth and fifteenth requests it is enough to say that there was evidence tending to show that one or more braces which had been put on to hold in place the corner post which fell were not a part of the staging when the fall occurred, to say nothing of the evidence that one upright rested only on brick.

The subjects treated of in the eighth, ninth, tenth and twelfth requests related to due care and assumption of risk concerning which full and complete general instructions were given to which no exception was taken, and besides this they seem to have been

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correctly dealt with in the portion of the charge which is set out in the bill of exceptions.

The fall of a staging which the jury could find had been furnished as a completed structure to be used in doing a certain work and then allowed by a superintendent to remain in place and be used as a means of doing other work cannot be held to be a transitory or passing risk of employment like that of falling through openings made or left in floors, as in *Beique* v. *Hosmer*, 169 Mass. 541, on which the defendant relies in support of its exception to the refusal to give the eleventh instruction requested, which was refused rightly.

The only other request, the second, was that no sufficient service of notice was made. Neither the exception to the refusal of this request nor that to the admission of evidence of the service made of the notices given by each plaintiff has been argued and we treat these exceptions as waived.

Three exceptions were taken to questions asked of an expert called to testify by the plaintiffs. The first question was in substance whether it would be a safe construction to erect the staging with one corner post resting upon a brick ledge; the second, the witness having answered that it was not proper construction, called for the reasons for that opinion, and the third was as to the liability of a brick ledge to loosen under pressure.

In support of these exceptions the defendant contends that there was no evidence that when the staging was constructed the northeast post or upright rested on the brick. But the witnesses who testified that that upright rested on a wall plate of timber when the staging was first made also testified that it never rested on the brick work, and in the conflict of testimony the jury might find that the upright always rested on the brick work. Nor was it imperative that the judge should exclude the question because it did not contain a statement as to the whole construction of the staging. We find no error in the admission of these questions.

The remaining exception is to the rejection of the defendant's offer to prove that there was a custom among carpenters to make an examination of a staging to see whether it is in proper condition before going upon it. In support of the exception the defendant contends that the evidence was relevant to the ques-

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tion of the plaintiffs' due care, as it would have tended to show that they must rely upon ascertaining for themselves whether the staging was safe before going upon it, and not depend for assurance of its safety upon inspection by the superintendent.

Without passing upon the question whether the evidence of such a custom would have been competent upon the question of the plaintiffs' care or negligence if they knew of the custom, it could not affect them unless they knew of it, and it is enough to say in overruling the exception that the defendant did not offer to show that they knew of it. *Collins* v. *New England Iron Co.* 115 Mass. 23, 25, and cases cited. See also *Dodge* v. *Favor*, 15 Gray, 82. Without that the offer was in effect to show what other workmen were accustomed to do, and would open a multitude of collateral investigations, which the judge properly could decline to allow the defendant to bring in to the trial.

Exceptions overruled.

COMMONWEALTH *vs.* ESAD IBRAHIM & others.

Worcester. September 28, 1903. — October 20, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Homicide. Practice, Criminal.

Under R. L. c. 218, Schedule of Forms, Murder, a grand jury is authorized to present an indictment for murder in the second degree, St. 1899, c. 409, having changed the pre-existing law in this respect.

The trial of an indictment for murder in the second degree is not a capital case, and may be held before one justice of the Superior Court.

INDICTMENT for murder in the second degree, returned by the grand jury in the Superior Court for the County of Worcester on May 11, 1903.

The indictment was as follows: "The Jurors for the Commonwealth aforesaid, on their oath present That Esad Ibrahim, Hussien Ibrahim, Teyfic Bekir, and Jelaladdin Ahmid, each being of Northbridge in said County of Worcester, on the twenty-eighth day of April in the year of our Lord one thousand nine hundred and three, at Northbridge in said County of Worcester,

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did assault and beat Arif Fainey with intent to murder him by striking and stabbing him in and upon the leg with a knife, and by such assault and beating did kill and murder Arif Fainey. And the jurors further say that the said defendants are guilty of murder in the second degree, and not in the first degree."

The defendants were tried in the Superior Court before *Gaskill*, J. Before the jury were impanelled or sworn, the defendants protested against going to trial before a single justice. The protest was overruled by the judge.

At the close of the evidence the judge ordered a verdict of not guilty in favor of the defendants Jelaladdin Ahmid and Teyfic Bekir.

The defendants asked for the following ruling: "This being an indictment for murder, the indictment is defective in that the grand jury and not the petit jury have found the degree of murder, and therefore the defendants and none of them should be held to answer the charge." The judge refused to make this ruling. The defendants Esad Ibrahim and Hussien Ibrahim asked for rulings that there was no evidence on which the jury could find them respectively guilty of the charge in the indictment. The judge refused so to rule.

The jury found the defendants Esad Ibrahim and Hussien Ibrahim each guilty of manslaughter, but not guilty of the residue of the indictment. These defendants alleged exceptions.

These defendants also filed a motion in arrest of judgment, on the grounds, first, that they had been indicted for murder in the second degree by the grand jury, and that the trial jury and not the grand jury had the right and power to find the degree of murder, and therefore that the indictment was defective, and the court had no jurisdiction to try it; and, secondly, that the court had no jurisdiction to try an indictment for murder with a single justice sitting, but that an indictment for murder could only be tried at a regular or special sitting of the court with two or more justices of the court sitting. The judge denied the motion, and the defendants Ibrahim appealed.

F. F. Dresser, (*A. F. Flint* with him,) for the defendants Ibraham.

R. Hoar, District Attorney, (*G. S. Taft*, Assistant District Attorney, with him,) for the Commonwealth.

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KNOWLTON, C. J. The important question in this case grows out of the St. 1899, c. 409, (R. L. c. 218,) Schedule of Forms, Murder, in which we find these words, following the language which charges the crime: "(And the jurors further say that the defendant is guilty of murder in the second degree and not in the first degree). This may be added if murder in the first degree is not alleged." The indictment in the present case charges the defendants with murder in the second degree, following this form, and the case, not being considered capital, was tried before one justice, against the objection of the defendants, instead of before two justices. Prior to the enactment of this statute, under the St. 1858, c. 154 (re-enacted in the Gen. Sts. c. 160, §§ 1–7, Pub. Sts. c. 202, §§ 1–7, R. L. c. 207, § 1), although the murder might be in the first degree or in the second degree, the indictment always contained charges which, if proved, might constitute murder in the first degree, and the degree of murder was expressly found by the jury at the trial. *Commonwealth* v. *Gardner*, 11 Gray, 438. *Commonwealth* v. *Desmarteau*, 16 Gray, 1. *Opinion of the Justices*, 9 Allen, 585. *Green* v. *Commonwealth*, 12 Allen, 155, 170, 172. *Commonwealth* v. *Gilbert*, 165 Mass. 45, 58. These statutes and rules of law remain unchanged, except so far as they are modified by the form prescribed for an indictment for murder, and the accompanying statement from which we have quoted. In this there is an express provision for an indictment for murder in the second degree, whenever the grand jury do not deem it their duty to charge murder in the first degree. This language must be given effect unless there are other provisions or principles of law which render it nugatory.

No question of authority in the Legislature to permit such an indictment is raised. The whole subject, so long as there is no departure from constitutional requirements, is within legislative control. There being different degrees of the same offence, punishable differently, it is in accordance with the general theory of criminal pleading to provide for indictments showing the extent and degree of the criminality charged against the defendant. It is also in accordance with the practice in many of the States which recognize different degrees of murder. See *State* v. *Hamlin*, 47 Conn. 95, 117; *Kennedy* v. *State*, 6 Ind. 485;

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Fahnestock v. *State*, 23 Ind. 231; *Snyder* v. *State*, 59 Ind. 105, 107; *State* v. *Bowen*, 16 Kans. 475; *Ward* v. *State*, 96 Ala. 100; *State* v. *Neeley*, 20 Iowa, 108; *State* v. *Gilchrist*, 113 N. C. 673. There is no good reason, either in principle or practice, why a grand jury should not be permitted in an indictment to charge a defendant with murder either in the first degree or in the second degree, according to their view of the evidence in the case. It seems plain that the Legislature intended to authorize this. The former statutes, which are re-enacted, are left in full force in all cases in which an indictment charges murder generally, which in legal effect may be murder in the first degree. In such cases, if the evidence at the trial leads the jury to a verdict of murder in the second degree, they so declare, as they make a like express declaration if they find the defendant guilty of the offence in the more aggravated form included in the charge. The provision that "the degree of murder is to be found by the jury," does not apply to cases in which no question in regard to the degree of the crime is presented to them. The defendant may plead guilty of murder in the first degree or in the second degree. *Green* v. *Commonwealth*, 12 Allen, 155. The plea if accepted determines his guilt, whether it be of one degree or the other, and the jury of trials do not consider it. In like manner a provision for an indictment for murder in the second degree does not conflict with this statute as to the duty of the trial jury to find the degree of guilt. It leaves them to perform that duty whenever an indictment in common form is before them, presenting a question as to the degree of the defendant's guilt. We are of opinion that this statute changed the pre-existing law by authorizing grand juries to present indictments for murder in the second degree.

The crime charged by such an indictment is not a capital crime. *Green* v. *Commonwealth*, 12 Allen, 155, 173. A capital crime is one punishable with the death of the offender. In this Commonwealth, for a long time, a different tribunal has been required for the trial of capital cases from that required for the trial of less heinous crimes. Rev. Sts. c. 82, § 26; c. 136, § 21. St. 1859, c. 282. Gen. Sts. c. 112, §§ 5, 8, 9, 19, 20; c. 114, § 6. St. 1869, c. 433, §§ 1, 2. St. 1872, c. 232. Pub. Sts. c. 150, §§ 5, 8, 18, 19; c. 152, § 6. St. 1891, c. 379, § 1. St.

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1894, c. 204. R. L. c. 157, §§ 7, 8. In some of these statutes the words used are "a crime that is punishable with death," in some "a capital offence," in some "a capital crime," and in some "the crime of murder." As prior to the year 1899 an indictment for murder always contained all the allegations necessary to warrant a verdict of guilty of murder in the first degree, every trial for murder was a capital case, and these special provisions in regard to the trial pertained to all alike. As a trial upon an indictment for murder in the second degree is not a capital case, the R. L. c. 157, § 8, providing that the trial of the indictment in capital cases shall be heard before two or more justices, is not applicable to it. This not only follows upon a true construction of the language of the statute, but it is analogous to the law and the practice in reference to a large number of crimes punishable by imprisonment for life. R. L. c. 207, §§ 17, 21, 22, 24; c. 208, §§ 1, 2, 14, 33, 42; c. 209, §§ 5, 6, 14; c. 210, § 1; c. 206, § 2. The judge rightly held that the trial of the indictment might proceed before one justice.

The judge rightly refused to rule that there was no evidence to warrant a verdict of guilty against these defendants. There were various circumstances, including the declarations of the deceased person, which well might satisfy the jury beyond a reasonable doubt that the fatal wound was not self-inflicted by the victim, but was inflicted upon him by the defendant Esad Ibrahim, as a part of an assault in which the two brothers were jointly engaged.

Exceptions overruled; order overruling motion in arrest of judgment affirmed.

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HORACE G. WESTLAKE & another *vs.* JOHN H. DUNN & another.

Berkshire. September 8, 1903. — October 21, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Equity Jurisdiction. Estoppel.

If one executes and acknowledges a deed of real estate, with the name of the grantee left blank, and temporarily intrusts it to another, on his representation, that he wants to show it to a friend who is going to let him have part of the purchase money, and that he will return it in a few minutes, and if the person thus obtaining the deed fraudulently inserts his name in the blank and mortgages the property to a savings bank which lends him money on it in good faith, this does not preclude the signer of the deed from asserting his title against the bank, and he may maintain a bill in equity to set aside the deed and cancel the mortgage.

BILL IN EQUITY, filed July 24, 1901, by Horace G. Westlake and James D. Bell, both of Hillsdale in the State of New York, against John H. Dunn, of the city of New York, and the Berkshire County Savings Bank, praying, that a deed from Westlake to Dunn of certain real estate in Pittsfield might be declared void, it never having been delivered to Dunn for the purpose of passing title to the premises, that the savings bank might be restrained from foreclosing a mortgage on the premises purporting to have been made by Dunn, and for further relief.

In the Superior Court the case was heard by *Fox*, J. The bill was taken *pro confesso* against the defendant Dunn. The judge found for the plaintiffs, and ruled that the plaintiff Westlake was entitled to a decree requiring the defendant savings bank to discharge the mortgage. The defendant savings bank alleged exceptions.

C. E. Hibbard & C. L. Hibbard, for the defendant bank.

H. C. Joyner & H. M. Whiting, for the plaintiff.

MORTON, J. This is a bill in equity to have a deed from the plaintiff Westlake to the defendant Dunn, alleged to have been obtained by fraud, declared null and void, and to have a mortgage from Dunn to the defendant bank of the same property cancelled and discharged. The judge ruled and found in favor

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of the plaintiffs and the case is here on exceptions by the defendant bank to the refusal of the judge to give certain rulings requested by it. The defendant Dunn did not appear and the bill was taken *pro confesso* against him.

There is no serious dispute as to the facts. The evidence consisted of the testimony of one Bell, the attorney for Westlake, and who is also one of the plaintiffs, and a statement of facts by the attorneys for the bank, and the deeds and documents referred to in the testimony on one side and the other.

From this evidence it appears that Westlake was the owner of certain real estate in Pittsfield which he wanted to sell, and that there were negotiations between him and Dunn in regard to a sale of the same. In consequence of these negotiations, the plaintiff Bell prepared a deed of the property at the request of Westlake. This deed was signed and acknowledged by Westlake. When he signed and acknowledged it, it was unsealed and the name of the grantee was blank. In this condition the deed was handed to Dunn in order that he might show it as he represented to a possible purchaser. Mrs. Westlake had not signed it, however, and it was returned at Bell's suggestion to have her sign it, which she did. Subsequently the seals and the revenue stamps were put on but the name of the grantee still remained blank. In this condition Dunn obtained the deed from Bell, to whom Westlake had intrusted its delivery and the receipt of the purchase money, by representing that he wanted to take it to show to a friend who was going to let him have $2,000 of the purchase money, and that he would return it in a few minutes. He did not return it, but wrote in his own name as grantee and then took it to the defendant bank to which he had previously applied for a loan on the property of $2,000, which had been approved, and delivered it to the bank and executed a note and mortgage to the bank for $2,000 which thereupon paid him that amount, and on the same day caused the deed and mortgage to be duly recorded. The officers of the bank and its attorney acted in good faith, and had no knowledge of the fraud that had been perpetrated by Dunn. Subsequently the plaintiff Westlake discovered the fraud, and, upon the commencement of foreclosure proceedings by the bank in June, 1901, brought this bill.

Without going further into detail, it is clear, we think, that

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the deed was obtained from Bell by Dunn under circumstances that warranted the finding made by the judge that the deed never was delivered with intent to pass the title, and also the further finding made by the judge that there was a fraudulent insertion by Dunn of his name as grantee. The deed never having been delivered with intent to pass the title as a completed deed or with authority to Dunn to insert the name of the grantee it had no force or validity as a deed, no title vested in Dunn and he could, of course, convey none. The insertion of his name as grantee by himself was an act wholly unauthorized even if it did not constitute a forgery. The subsequent acceptance by Westlake of a deed from Dunn to himself, before the discovery of the fraud, and the recording of it did not constitute a ratification of what had been done and a confirmation of Dunn's title, because, in accepting the deed and causing it to be recorded, Westlake acted in ignorance of the fraud that had been committed by Dunn.

The bank contends that Westlake is estopped to set up title in himself and is not entitled to relief in equity. If that is so it must be either on the ground that the conduct of Westlake and his agent Bell was calculated to, and did induce the bank to lend the money and take the note and mortgage and that they knew or ought to have known that such was likely to be the effect of their conduct (*Stiff* v. *Ashton*, 155 Mass. 130), or on the ground of negligence on the part of Westlake and Bell in suffering Dunn to take the deed and thereby enabling him to commit the fraud and procure the loan from the bank, and that as between two innocent parties the one whose negligence has contributed to the wrongdoing complained of should suffer the loss occasioned thereby, and not the other. The effect of such a contention, if sustained on either ground, would be to leave the title in Dunn and the bank. But we think that the contention of the bank cannot be sustained. Neither Westlake nor Bell did or said anything which they knew or ought to have known would or could induce the bank or any one else to lend money to Dunn and take a mortgage on the land in question as security. They were entirely ignorant of the whole transaction. They had no reason even to suspect that Dunn was going to make the use which he did of the deed. This ground of estoppel therefore fails. *Stiff* v. *Ashton*, *supra*. So also we think does the other.

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It was not negligent on Bell's part to entrust the deed with the name of the grantee left blank to Dunn to show, as he represented, to a friend with the promise to return it in a few minutes. Dunn had no authority to fill in the blank either with his own name or that of any other person, though he had said that he was going to take the deed to himself, and there was no objection to his doing so, provided he paid the purchase price. Neither Westlake nor Bell owed any duty to any one to see that Dunn did not use the deed in the manner in which he did. If there was no such duty on their part then there was no negligence. See *O'Herron* v. *Gray*, 168 Mass. 573. *Scollans* v. *Rollins*, 179 Mass. 346. *Scholfield* v. *Londesborough*, [1896] A. C. 514. A deed is a different instrument from the instruments referred to and dealt with in *Russell* v. *American Bell Telephone Co.* 180 Mass. 467, and in *Scollans* v. *Rollins*, *supra*.

The rulings requested by the defendant were given in part and refused in part. We discover no error on the part of the judge in dealing with them as he did. The result is that the exceptions must be overruled.

So ordered.

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INHABITANTS OF WILLIAMSBURG *vs.* INHABITANTS OF ADAMS.

Hampshire. September 15, 1903. — October 21, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Pauper, Settlement.

Under St. 1874, c. 274, and St. 1878, c. 190, as amended by St. 1879, c. 242, a married woman of the age of twenty-one years, coming in 1869 to a town in this Commonwealth with her husband who never acquired a settlement in this Commonwealth, and living there with her husband and children for five years continuously, without receiving relief as a pauper, if alive in this Commonwealth in 1879, can be found to have had a settlement in the town, being an unsettled woman within the meaning of § 2 of St. 1879, c. 242, at the time of the passage of that act, and an unsettled person within the meaning of § 3 of St. 1874, c. 274.

CONTRACT for expenses incurred by the plaintiff town for the relief of one Edward Guyott, Jr., a pauper, alleged to have had

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a settlement in the defendant town at the time the aid was furnished. Writ dated August 15, 1901.

At the trial in the Superior Court before *Maynard*, J., the jury returned a verdict for the plaintiff in the sum of $138.07; and the defendant alleged exceptions.

The statutes referred to are as follows:

St. 1874, c. 274, §§ 2 and 3, provided:

"Section 2. Any woman of the age of twenty-one years who resides in any place within this state for five years together without receiving relief as a pauper shall thereby gain a settlement in such place. The first section of the three hundred and ninety-second chapter of the acts of eighteen hundred and seventy is hereby repealed.

"Section 3. No existing settlement shall be changed by any provision of this act unless the entire residence and taxation herein required accrues after its passage; but any unsettled person shall be deemed to have gained a settlement upon the completion of the residence and taxation herein required, though the whole or a part of the same accrues before the passage of this act."

St. 1878, c. 190, § 1, cls. 1, 6, provided:

"*First.* A married woman shall follow and have the settlement of her husband, if he has any within the state; otherwise her own at the time of the marriage, if she then had any, shall not be lost or suspended by the marriage."

"*Sixth.* Any woman of the age of twenty-one years, who resides in any place within this state for five years together, without receiving relief as a pauper, shall thereby gain a settlement in such place."

Section 5 of that statute repealed, with other acts, St. 1874, c. 274.

St. 1879, c. 242, is as follows:

"Section 1. Section one of chapter one hundred and ninety of the acts of the year eighteen hundred and seventy-eight is hereby amended by striking out, in the sixth clause thereof, the words 'without receiving relief as a pauper,' and by adding at the end of said section the words following: '*provided, however*, that nothing in this section contained shall be construed to give to any person the right to acquire a settlement, or be in process

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of acquiring a settlement while receiving relief as a pauper, unless within five years from the time of receiving such relief he shall reimburse the cost thereof to the city or town furnishing the same.'

"Section 2. The provisions of said sixth clause shall be held to apply to married women who have not a settlement derived by marriage under the provisions of the first clause, and to widows; and a settlement thereunder shall be deemed to have been gained by any unsettled woman upon the completion of the term of residence therein mentioned, although the whole or a part of the same accrues before the passage of this act."

D. Malone, for the defendant.

W. G. Bassett, for the plaintiff.

HAMMOND, J. The verdict shows that the jury must have found that at the time the aid was furnished to Edward Guyott, Jr., he had a settlement in Adams through his mother Mary, under and by virtue of St. 1874, c. 274, and St. 1878, c. 190, as amended by St. 1879, c. 242; and the only question before us is whether the evidence warranted such a finding.

The evidence tends to show that in the spring of 1869 Mary Guyott came with her husband and children from Canada to Adams and lived there with them for five years, and then they all moved to some other town. The family were evidently of French extraction and appear to have always lived in Canada until the year they came to Adams, and it does not appear that the husband ever had a settlement in this State. Indeed the fair inference is that he never did have one. And it may fairly be inferred also upon the evidence that before moving to Adams Mary never acquired a settlement in this State. It is contended by the defendant that there was no evidence which would warrant a finding that she resided there without "receiving relief as a pauper." The evidence tended to show that all the time in Adams she was living with her husband and children, that shortly after his arrival in Adams the husband purchased provisions in considerable quantities, and that he went to work. There is nothing to show that he was aged, infirm or indolent. On the contrary the glimpses we get of him seem to show that he was active. The fair inference from the evidence is that he was an immigrant of middle age, able and willing to work, and

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that he kept his family together. Moreover the defendant made no attempt to show affirmatively that any aid had been furnished to the family or on its account. Upon this state of the evidence the jury might properly find that Mary had received no relief as a pauper during her residence in Adams. She was evidently twenty-one years of age when she came there, but being a married woman she had acquired no settlement until the passage of St. 1879, c. 242, (*Somerville* v. *Boston*, 120 Mass. 574,) and was therefore an unsettled person within the meaning of the phrase as used in that statute and in St. 1874, c. 274. There can be no doubt upon the evidence that she was alive and in this Commonwealth at the time of the passage of the later statute. The jury therefore could properly find that by her residence in Adams for five years she acquired by virtue of these statutes a settlement in that town. St. 1874, c. 274. St. 1878, c. 190, § 1, cls. 1, 6. St. 1879, c. 242, § 2. *Cambridge* v. *Boston*, 130 Mass. 357. *Dedham* v. *Milton*, 136 Mass. 424. A settlement once acquired is presumed to continue until another is subsequently acquired, and it does not appear that she ever acquired another, or that Edward the pauper ever acquired a settlement except through her.

Exceptions overruled.

SPRINGFIELD ENGINE STOP COMPANY *vs.* JOHN C. SHARP, JR. & others.

Hampden. September 23, 1903. — October 21, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Sale.

In an action for the price of an engine stop, it appeared, that the stop had been placed by the plaintiff on an engine of the defendant for a certain period of trial, to be removed by the plaintiff if the defendant did not like it, otherwise to be purchased at a price named. The period expired on a Friday. On Saturday the defendant used the stop, and on Monday the stop was used but on the same day the defendant notified the plaintiff to remove it. *Held*, that, although the use of the stop on Monday was deprived of all force as evidence of an election to take the stop by the notice to remove it, yet the use of the stop on Saturday unexplained was evidence to go to the jury on the question whether the defendant on that day elected to take the stop and changed his mind on Monday.

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CONTRACT for $200, the price of an engine stop installed in the factory of the defendants at Taunton. Writ dated August 24, 1901.

In the Superior Court the case was tried before *Mason*, C. J., who at the close of the evidence ordered a verdict for the defendants. The plaintiff alleged exceptions.

J. L. Doherty & W. G. Brownson, for the plaintiff.

C. C. Spellman & C. F. Spellman, for the defendants.

LORING, J. This was an action for the price of an engine stop. A verdict for the defendants was ordered by the judge, and the case is here on an exception to that ruling.

It appeared that the plaintiff placed an engine stop on an engine of the defendants, for a thirty days' trial, in competition with another engine stop. The price was to be $200, and the stop was to be taken off by the plaintiff if the defendants did not like the stop. The contract was by word of mouth, and nothing was said as to what should be done at the end of the thirty days if the defendants decided not to take the stop. The stop was installed and turned on for use on the afternoon of May 2. On June 1, the defendants wrote asking for another thirty days' trial, and on June 8 the plaintiff wrote that it would extend the time of trial for thirty days as requested.

On the morning of Monday, July 8, the defendants wrote to the plaintiff that after sixty days' trial they had determined to accept the other stop, and that the plaintiff's machine could be taken out at its convenience. The defendants' witness testified that "the plaintiff's stop was never used after the third day of July," and there was no other evidence on this point.

Even if fractions of a day are ordinarily to be considered in computing the thirty days in such a case as this, there was evidence warranting a finding that the extension continued until, but not including, July 1. The question whether the extension expired on June 30 or July 1 was a question of fact for the jury.

The plaintiff's first contention is that failure to give notice until July 8 and the use of the stop on Saturday, July 1, and Monday, July 8, is conclusive of the defendants' liability; and in support of that contention it relies on *Prairie Farmer Co.* v. *Taylor*, 69 Ill. 440. That also was a case where a thirty days'

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trial was to be made of a machine; but in that case the machine was used for nearly a year without notice of an election, and what is said there must be taken to have had reference to the facts then before the court. The true rule is laid down in the other cases cited by the plaintiff, and it is this: The party to the contract who is to make the trial has the full period agreed upon for the trial, and in the absence of any stipulation on the point he has a reasonable time after the expiration of it to signify his election. See *Elphick* v. *Barnes*, 5 C. P. D. 321; *Spickler* v. *Marsh*, 36 Md. 222; *Kahn* v. *Klabunde*, 50 Wis. 235; *Waters Heater Co.* v. *Mansfield*, 48 Vt. 378.

The plaintiff's next contention is that it had a right to go to the jury on the use made on Saturday and on Monday as evidence of the defendants' election to take the stop. The retention of the stop after Friday, June 30, apart from the use of it, had no significance. This was not the case of a sale or return; by the terms of the agreement the plaintiff was to disconnect the stop from the engine and take it away if the defendants were not satisfied with it. But the use of the stop after the expiration of the period of trial agreed upon, unexplained, would be evidence of an election, as is the failure to return a machine taken under a sale or return agreement. See *Kahn* v. *Klabunde*, 50 Wis. 235; *Spickler* v. *Marsh*, 36 Md. 222; *Waters Heater Co.* v. *Mansfield*, 48 Vt. 378. The English cases are collected in Benjamin, Sales, 593 *et seq.* In the case at bar the use of the stop on Monday could not be taken to be evidence of an election, for on Monday morning the defendants wrote to the plaintiff that they elected to take the other stop, and the letter was posted between two and three o'clock on that day. This letter deprives the use made of the machine on Monday of all force as evidence of an election, as was said in *Hunt* v. *Wyman*, 100 Mass. 198, 200, in a similar case. See also *Elphick* v. *Barnes*, 5 C. P. D. 321.

There is nothing on the record showing why the defendants used the stop on Saturday. If, for example, the use on Saturday came from inadvertence or because the defendants thought that the extension did not expire until the end of that day, the use on that day would be deprived of all force as evidence of an election, as we have held to be the case of the use on Monday.

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And there may have been other explanations of that use which would result in the same conclusion.

But no explanation was given at the trial as to the use made of the machine on Saturday, and on this state of the evidence the plaintiff had a right to go to the jury on the question whether the use of the stop on Saturday showed an election to take the stop and that the defendants afterward changed their minds and wrote the letter declining it on Monday.

Exceptions sustained.

184	269
185	1135
d185	1520
184	269
188	369
188	370
184	269
193	452
f194	3100

ELLSWORTH AIKEN *vs.* HOLYOKE STREET RAILWAY COMPANY.

Hampden. September 23, 1903. — October 21, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Negligence. Railway Company. Master and Servant. Evidence.

In an action for a wanton and wilful injury caused by a reckless omission of duty, it is no defence that the plaintiff failed to exercise ordinary care for his safety.

If a boy six and one half years of age is clinging to the step at the forward end of an electric car, which is passing around a curve from one street to another, trying to get into a stable position and crying to the motorman to let him off, and the motorman, seeing and hearing the boy and knowing that he is in a place of danger, turns on the power in a wanton and reckless way, to start the car quickly at full speed, the boy, if thus thrown off and injured, may recover from the railway company for his injuries without showing that he was in the exercise of ordinary care at the time of and immediately after the motorman's reckless act.

A master is liable for the acts of his servant done recklessly or wilfully in the course of the servant's employment.

On the issue of a plaintiff's due care the defendant cannot show previous acts of negligence of the plaintiff.

TORT by an infant against a street railway company for personal injuries. Writ dated July 6, 1898.

At a previous stage of this case, reported in 180 Mass. 8, the plaintiff's exceptions were sustained by this court after a verdict had been ordered in the Superior Court for the defendant. At the new trial in the Superior Court before *Lawton*, J., the jury returned a verdict for the plaintiff in the sum of $5,000. The

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defendant alleged exceptions, raising the questions stated by the court.

W. H. Brooks, (*W. Hamilton* with him,) for the defendant.

A. L. Green, (*F. F. Bennett* with him,) for the plaintiff.

KNOWLTON, C. J. The most important question in this case grows out of the instructions to the jury upon the third count. This count charges the defendant, by its servants, with having started up the car recklessly, wantonly and with gross disregard of the plaintiff's safety, while he was in a place of great peril upon the step of the car, and with having thrown him upon the ground and under the wheels of the car. There was evidence tending to show that the plaintiff, a boy six and one half years of age, ran near or against the car, and was upon the lower step at the forward end as the car was going around a curve from one street into another, and was clinging to the step trying to get into a stable position, and that he there cried out to the motorman, "Let me off"; that the motorman saw and heard him and knew that he was in a place of danger, and that he then turned on the power in a wanton and reckless way, with a view to start the car quickly, and that the plaintiff was thus thrown off and injured. This testimony was contradicted, but it was proper for the consideration of the jury. The judge instructed the jury that if they found the facts to be in accordance with this contention of the plaintiff, they would be warranted in finding that the conduct of the motorman was wanton and reckless, and in returning a verdict for the plaintiff. He also instructed them that to maintain the action on this ground, it must be proved that the motorman wilfully and intentionally turned on the power, with a view to making the car start forward rapidly and go at full speed quickly, but that it was not necessary to prove that he did this with the intention of throwing the boy off and injuring him. He also told them that to warrant a recovery upon this state of facts, the plaintiff need not show that he was in the exercise of due care. The defendant excepted to that part of the instruction which relates to due care on the part of the plaintiff.

The defendant contends that while it was not necessary for the plaintiff to show due care anterior to the act of the motorman, he was bound to show due care which was concurrent with

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this act and immediately subsequent to it. This brings us to a consideration of the rules and principles applicable to this kind of liability. It is familiar law that in the absence of a statutory provision, mere negligence, whatever its degree, if it does not include culpability different in kind from that of ordinary negligence, does not create a liability in favor of one injured by it, if his own negligence contributes to his injury. It is equally true that one who wilfully and wantonly, in reckless disregard of the rights of others, by a positive act or careless omission exposes another to death or grave bodily injury, is liable for the consequences, even if the other was guilty of negligence or other fault in connection with the causes which led to the injury. The difference in rules applicable to the two classes of cases results from the difference in the nature of the conduct of the wrongdoers in the two kinds of cases. In the first case the wrongdoer is guilty of nothing worse than carelessness. In the last he is guilty of a wilful, intentional wrong. His conduct is criminal or *quasi* criminal. If it results in the death of the injured person, he is guilty of manslaughter. *Commonwealth* v. *Pierce*, 138 Mass. 165. *Commonwealth* v. *Hartwell*, 128 Mass. 415. The law is regardful of human life and personal safety, and if one is grossly and wantonly reckless in exposing others to danger, it holds him to have intended the natural consequences of his act, and treats him as guilty of a wilful and intentional wrong. It is no defence to a charge of manslaughter for the defendant to show that, while grossly reckless, he did not actually intend to cause the death of his victim. In these cases of personal injury there is a constructive intention as to the consequences, which, entering into the wilful, intentional act, the law imputes to the offender, and in this way a charge which otherwise would be mere negligence, becomes, by reason of a reckless disregard of probable consequences, a wilful wrong. That this constructive intention to do an injury in such cases will be imputed in the absence of an actual intent to harm a particular person, is recognized as an elementary principle in criminal law. It is also recognized in civil actions for recklessly and wantonly injuring others by carelessness. *Palmer* v. *Chicago, St. Louis & Pittsburgh Railroad*, 112 Ind. 250. *Shumacher* v. *St. Louis & San Francisco Railroad*, 39 Fed. Rep. 174. *Brannen* v. *Kokomo*,

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Greentown & Jerome Gravel Road Co. 115 Ind. 115. In an action to recover damages for an assault and battery, it would be illogical and absurd to allow as a defence, proof that the plaintiff did not use proper care to avert the blow. See *Sanford* v. *Eighth Avenue Railroad*, 23 N. Y. 343, 346. It would be hardly less so to allow a similar defence where a different kind of injury was wantonly and recklessly inflicted. A reason for the rule is the fact that if a wilful, intentional wrong is shown to be the direct and proximate cause of an injury, it is hardly conceivable that any lack of care on the part of the injured person could so concur with the wrong as also to be a direct and proximate contributing cause to the injury. It might be a condition without which the injury could not be inflicted. See *Newcomb* v. *Boston Protective Department*, 146 Mass. 596. It might be a remote cause, but it hardly could be a cause acting directly and proximately with the intentional wrongful act of the offender. *Judson* v. *Great Northern Railway*, 63 Minn. 248, 255. The offence supposed is different in kind from the plaintiff's lack of ordinary care. It is criminal or *quasi* criminal. Not only is it difficult to conceive of a plaintiff's negligence as being another direct and proximate cause foreign to the first, yet acting directly with it, but it would be unjust to allow one to relieve himself from the direct consequences of a wilful wrong by showing that a mere lack of due care in another contributed to the result. The reasons for the rule as to the plaintiff's care in actions for ordinary negligence are wanting, and at the same time the facts make the rule impossible of application. The general rule that the plaintiff's failure to exercise ordinary care for his safety, is not a good defence to an action for wanton and wilful injury caused by a reckless omission of duty, has been recognized in many decisions, as well as by writers of text-books. *Aiken* v. *Holyoke Street Railway*, 180 Mass. 8, 14, 15. *Wallace* v. *Merrimack River Navigation & Express Co.* 134 Mass. 95. *Banks* v. *Highland Street Railway*, 136 Mass. 485, 486. *Palmer* v. *Chicago, St. Louis & Pittsburgh Railroad*, 112 Ind. 250. *Brannen* v. *Kokomo, Greentown & Jerome Gravel Road Co.* 115 Ind. 115. *Florida Southern Railway* v. *Hirst*, 30 Fla. 1. *Shumacher* v. *St. Louis & San Francisco Railroad*, 39 Fed. Rep. 174. 7 Am. & Eng. Encyc. of Law, (2d ed.)

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443 and note. Beach, Contr. Neg. (3d ed.) §§ 46, 50, 64, 65. Wood, Railroads, (2d ed.) 1452. Elliott, Railroads, § 1175. Thompson, Neg. § 206. Cooley, Torts, (2d ed.) 810. We have been referred to no case in which it is held that it makes any difference whether the plaintiff's lack of ordinary care is only previous to the defendant's wrong and continuing to the time of it, or whether there is such a lack after the wrong begins to take effect. It is difficult to see how there can be any difference in principle between the two cases. In this Commonwealth, as in most other jurisdictions, liability does not depend upon which of different causes contributing to an injury is latest in the time of its origin, but upon which is the direct, active, efficient cause, as distinguished from a remote cause, in producing the result.

There are expressions in some of the cases which imply the possibility of contributory negligence on the part of the plaintiff in a case of wanton and reckless injury by a defendant. If there is a conceivable case in which a plaintiff's want of due care may directly and proximately contribute as a cause of an injury inflicted directly and proximately by the wilful wrong of another, such a want of care must be something different from the mere want of ordinary care to avoid an injury coming in a usual way. There is nothing to indicate the existence of peculiar conditions of this kind in the present case. Conduct of a plaintiff which would be negligence precluding recovery if the injury were caused by ordinary negligence of a defendant, will not commonly preclude recovery if the injury is inflicted wilfully through wanton carelessness. This is illustrated by the former decision in this case and by many others. *Aiken* v. *Holyoke Street Railway*, 180 Mass. 8. *McKeon* v. *New York, New Haven, & Hartford Railroad*, 183 Mass. 271. As to this kind of liability of the defendant, it was certainly proper to instruct the jury that, in reference to ordinary kinds of care to avoid an injury from a car, the plaintiff need not show that he was in the exercise of due care if a lack of such care would have no tendency to cause the wilful and wanton injury. The fair interpretation of the instruction given is, that it referred to ordinary kinds of care to avoid an injury from an electric car. On this branch of the case there seems to have been no reason for an instruction in regard to any special care, and probably neither counsel nor the court

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had any care in mind except that, in reference to which, in any view of the law, the instruction was properly given. We are of opinion that the ruling excepted to was correct.

The instruction that a master is liable for the acts of his servant done recklessly or wilfully in the course of his employment, was correct. *Howe* v. *Newmarch*, 12 Allen, 49. *Young* v. *South Boston Ice Co.* 150 Mass. 527. *Wallace* v. *Merrimack River Navigation & Express Co.* 134 Mass. 95. *Ramsden* v. *Boston & Albany Railroad*, 104 Mass. 117. *Mott* v. *Consumers' Ice Co.* 73 N. Y. 543.

The evidence of previous acts of carelessness on the part of the plaintiff was rightly excluded. *Hatt* v. *Nay*, 144 Mass. 186.

Exceptions overruled.

OVID ARCHAMBAULT *vs.* JOSEPH L. R. ARCHAMBAULT.

Hampden. September 23, 1903. — October 21, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Negligence, Employer's liability.

In an action for personal injuries incurred in the defendant's stone yard, it appeared, that the plaintiff was eighteen years of age and had been in the defendant's employ for five months learning a stone cutter's trade, that he had worked from time to time for four or five days on the cutting of a large stone tilted up by means of stone chips placed beneath it on the wooden blocks supporting it. He testified that he knew that if the stone was not suitably propped up he would get hurt and that he made no effort to inform himself how it was propped up. The plaintiff had finished working for the day, and was leaning over the stone in the act of picking up some tools which it was his duty to pick up, or in the act of picking up a match to light his pipe, when the stone fell upon him, causing the injury. *Held*, that the chance of the stone falling as it did was an obvious risk assumed by the plaintiff; *also*, that there was no evidence of due care on the part of the plaintiff or of negligence on the part of the defendant.

MORTON, J. This is an action of tort to recover for personal injuries caused to the plaintiff by the falling of a stone upon him while employed in the defendant's stone yard in Holyoke. At the close of the plaintiff's evidence, the presiding judge ruled that the plaintiff could not recover and directed a verdict for the

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defendant. The case is here on exceptions to this ruling and direction. We think that the ruling was right.

At the time of the accident the plaintiff was eighteen years old, and had been in the defendant's employ five months learning a stone cutter's trade. On the day of the accident he was set to work by the defendant on a stone designed for cornice work. The stone weighed about a ton and was thirteen feet long and ten inches thick, and thirteen inches wide on one side, and nine inches on the other. It was lying on wooden blocks about two feet high and rested on its narrowest side. It did not lie flat but was tilted up by means of stone chips placed beneath it on the wooden blocks so as to facilitate the work of cutting. This, as the testimony showed, was the usual and customary way of tilting up a stone on which a workman was engaged. The cutting was along the "nose" or projecting part of the stone, and as it progressed the stone was gradually tilted up. The chips were in about an inch from the edge. The plaintiff had worked on the stone from time to time for four or five days previous to the accident and had become familiar with the gradual shaping of it, but was not present when it was last tilted up, or when it was originally set up, which was done under the direction and supervision of the defendant. The plaintiff had previously seen the defendant putting stone chips under stones to tilt them up and had no reason to think that there was anything else under this. He testified that he knew that if it was not properly propped up he would get hurt and that he made no effort to inform himself how it was propped up. There was testimony tending to show that when the stone fell the plaintiff had finished working on it for the day and was leaning over it or upon it either in the act of picking up some tools which it was a part of his duty to pick up, or in the act of picking up a match to light his pipe with.

We think that the chance that the stone might fall as it did was one of the obvious risks assumed by the plaintiff. We also think that he was not in the exercise of due care and that there was no evidence of negligence on the part of the defendant.

Exceptions overruled.

A. Archambault, for the plaintiff.

C. T. Callahan, for the defendant, was not called upon.

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JOHN R. McCOMB *vs.* C. R. BREWER LUMBER COMPANY.

Berkshire. September 23, 1903. — October 21, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Deceit. Pleading, Civil.

A count in tort, containing allegations of false and fraudulent representations as to other matters, alleged that the defendant, a corporation, represented to the plaintiff that if he would purchase certain shares of the defendant's stock for $9,000 that sum should be put into the defendant's treasury to be used for working capital, and that the plaintiff purchased the stock, but that the $9,000 was not put into the defendant's treasury and used as working capital, but was used for other purposes. *Held*, that no damages in deceit could be allowed upon these allegations, which merely set forth the defendant's failure to carry out its promise, without any averment that the defendant at the time the promise was made did not intend to carry it out. *Whether*, under any circumstances a false representation as to a present intention, if properly alleged and proved, would support an action of deceit, was not considered.

CONTRACT, with three counts as stated by the court. Writ dated April 24, 1900.

In the Superior Court the case was tried before *Aiken*, J. The jury found for the plaintiff, in the sum of $137.65, assessing damages on the first count at $136.65, and on the third count at $1. The plaintiff alleged exceptions.

The third count, which is the only one material to the exceptions, was as follows:

"And the plaintiff says that in June, 1899, the defendant by its agent came to the plaintiff and with intent to deceive and defraud the plaintiff, falsely and fraudulently represented to him that the defendant owned property of the value of seventy-five thousand dollars, free from incumbrance, and owed no debts except debts to the amount of about six hundred dollars and was carrying on at said Great Barrington a large, successful and profitable business; that the defendant was a corporation with a capital stock of seventy-five thousand dollars, a portion of which, to wit, forty thousand dollars, was preferred stock on which the defendant was earning and distributing to its stockholders dividends of not less than 6% per annum and that if the plaintiff would become a member of said corporation and purchase one

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hundred shares of said preferred stock and one share of common stock and pay therefor the sum of nine thousand dollars, the plaintiff should be elected a director and treasurer of the defendant corporation forthwith and should receive a salary of fifteen hundred dollars per annum as such treasurer, and the nine thousand dollars paid by the plaintiff should be put in the treasury of said corporation to be used as a working capital.

"And the plaintiff says that relying upon said representations and believing them to be true he was induced to buy, and did buy, said shares and pay therefor nine thousand dollars; and the plaintiff says that said representations of the defendant were false and untrue, to the knowledge of the defendant, in this: The defendant did not then own property of the value of seventy-five thousand dollars and was not out of debt except debts to the amount of six hundred dollars, and was not doing a large, successful and profitable business, and was not earning 6% per annum dividends on its preferred stock, or any dividends, but on the contrary, its property was of little value and it owed debts to an amount greatly in excess of six hundred dollars, and its business was poor and run out and it could earn no dividends on its preferred stock, all of which the defendant then well knew, and the nine thousand dollars paid by the plaintiff to the defendant was not put in its treasury and used as working capital, but was, with the approval of the defendant, its directors and manager, used for other purposes than the business of the defendant."

H. C. Joyner, for the plaintiff.

C. Giddings, for the defendant.

HAMMOND, J. The declaration contains three counts. The first is contract to recover a month's salary as the defendant's treasurer; the second is contract for not complying with certain promises made in the sale of certain stock to the plaintiff by the defendant; and the third is tort for deceit in the same sale. No question was raised as to the pleadings, whether for misjoinder of counts or otherwise, and the case went to trial upon the declaration as it stood. At the close of the evidence the plaintiff waived the second count and the case went to the jury upon the first and third counts, upon each of which there was a verdict for the plaintiff, the damages on the first being the full amount claimed, and upon the third, $1.

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The exceptions relate only to the third count, and since the verdict was for the plaintiff on this, they are material only so far as they respect the question of damages. The principal difference between the instructions given by the judge and those requested by the plaintiff is that the judge declined to permit the jury to consider the allegation with reference to the promised use of the $9,000 paid by the plaintiff for the stock. As to this it is contended by the plaintiff that at the time the defendant promised to use the money as working capital it did not intend to keep the promise, and that a representation of a present intention is a representation of an existing fact and therefore may be false and fraudulent. But, without implying that the plaintiff's contention would be true under any circumstances, the difficulty with his case is that the question is not raised upon the record. The ruling that the jury should not consider the allegation with reference to the promised use of the money appears to have been made with reference to the third count, and, as applied to that, it was correct. An examination of the count will show that it does not contain any allegation that at the time the defendant said that the money should be used for working capital it had not the intention to perform that promise. It first sets out the representations which induced the plaintiff to purchase the stock, then proceeds to state in what respects they were false and fraudulent and the defendant's knowledge of the falsity, and then follows the only allegation respecting the representation as to the promised use of the money: "And the nine thousand dollars paid by the plaintiff to the defendant was not put in its treasury and used as working capital, but was, with the approval of the defendant, its directors and manager, used for other purposes than the business of the defendant." This is an allegation that the defendant failed to carry out its promise, and falls far short of an allegation that the defendant at the time it was made did not intend to carry it out. There is no allegation whatever as to the intent of the defendant at the time the promise was made. Indeed it is difficult to read that count, either by itself or in connection with the other counts, without feeling that the pleader studiously avoided alleging anything as to that intent. While the evidence as to the promised use and the actual use of this money may have been admissible upon the second count, the object of which

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was to recover damages for breach of the promise, it was not material upon the third count, even upon the question of damages, for the reasons above stated.

It is further contended by the plaintiff that the instructions given by the judge ignored the suppression by the defendant of the fact that a large portion of its capital stock had been used to secure the debt of the old corporation. The short answer to this is that this is not the fraud set out in the count, except so far as involved in the representations actually set out, and so far as involved with them the jury under the instructions were allowed to consider it. The result is that we see no error in the manner with which the court dealt with the requests, or in the instructions given.

As the question concerning the exclusion of the evidence of the amount for which the defendant's property was finally sold is not argued, we consider it waived.

Exceptions overruled.

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184 305
184 306
184 279
190 553

NASHUA RIVER PAPER COMPANY *vs.* COMMONWEALTH.

Worcester. September 29, 1903. — October 21, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Metropolitan Water Supply Act. Damages.

Under St. 1895, c. 488, § 14, the owner of real estate injured by the taking of the waters of the Nashua River is not entitled to compensation for damage to business, unless the real estate is situated in West Boylston, or in the part of Boylston or the part of Clinton described in that section. The provision of that section, that the commissioners appointed thereunder "shall determine the damage to and value of real estate, machinery and business," contemplates the determination of damage to business only in cases where such damage is provided for by the statute.

PETITION, filed in the clerk's office of the Supreme Judicial Court for the county of Worcester on June 10, 1899, under St. 1895, c. 488, § 14, for injury to real estate of the petitioner in the town of Pepperell, including two paper mills and their appurtenances, by the taking of the waters of the Nashua River.

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In accordance with an agreement of the parties, the case was reserved by *Hammond*, J. for determination by the full court, upon the question stated at the beginning of the opinion.

C. M. Thayer, for the petitioner.

R. A. Stewart, Assistant Attorney General, for the Commonwealth.

KNOWLTON, C. J. The only question reserved for our consideration is "whether the petitioner was entitled to have the loss of profits resulting from a temporary interruption of its business, caused by the taking, considered by the commission in making its award." We understand this to refer to the damage to business as distinguished from the diminution in rental value of the property, caused by temporary conditions affecting the uses to which it was adapted, including its use in the business then carried on upon it. Such a diminution, although only temporary, is paid for in assessing damages to property caused by a taking under statutes in the common form. *Bailey* v. *Boston & Providence Railroad*, 182 Mass. 537. *Boston Belting Co.* v. *Boston*, 183 Mass. 254.

The petitioner contends that it is entitled to damages to its real estate by reason of the peculiar provisions of the St. of 1895, c. 488, § 14, under which the assessment is made. This section mentions five classes of cases in which damages may be assessed under it: first, when real estate is taken for the reservoir; second, when real estate is entered upon and used; third, when real estate is injured by the taking of the waters of Nashua River, whether the real estate is within or without the Commonwealth; fourth, when real estate not taken, situated in the town of West Boylston or in specified parts of the towns of Boylston and Clinton, and not owned by the owner of the Lancaster Mills, is directly or indirectly decreased in value by the legislative act or the doings of the water board thereunder; fifth, when one owning an established business on land in the town of West Boylston, whether the land is taken or not, deems that his business is decreased in value by the loss of custom or otherwise, by the carrying out of the legislative act.

This petition presents a case of the third class. The petitioner's contention rests upon the provision that the commission appointed "shall determine the damage to and value of real estate,

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machinery and business"; and the precise question is whether the damage to business is to be determined in all classes of cases in which assessments are made under this section, or only in those classes in which there is a provision for the allowance of damages to business, apart from the use of the word "business" in the provision just quoted.

Under §§ 12 and 13 of this chapter, owners of property may recover damages caused "by any taking of property or by any change of grade, alteration or discontinuance of any railroad or public way, or by the construction or maintenance of any reservoir or other work, or by the interference with the use of any water, or by any other act or thing done by said board under this act." These damages are to be determined by a jury in the Superior Court "in the same manner as damages for lands taken for highways are determined." Property owners are to be compensated for damages caused by a variety of specified acts, and for damages caused by any other act of any kind under the statute. The rule stated includes damages to property no part of which is taken, if the damages are direct and proximate as distinguished from remote and consequential, and if they are special and peculiar as distinguished from general and public. R. L. c. 48, § 15. *Sheldon* v. *Boston & Albany Railroad*, 172 Mass. 180. *Putnam* v. *Boston & Providence Railroad*, 182 Mass. 351. If an assessment is made under these sections, no damages can be allowed for loss in a business as distinguished from the diminution in value of the real estate where the business is conducted. *New York, New Haven, & Hartford Railroad* v. *Blacker*, 178 Mass. 386. *Bailey* v. *Boston & Providence Railroad*, 182 Mass. 537. *Boston Belting Co.* v. *Boston*, 183 Mass. 254. The first three classes of cases mentioned in § 14 are included in §§ 12 and 13, and if the contention of the petitioner is correct, a property owner whose land has been taken or entered upon and used or injured by the taking of the waters, may recover damages to his business if he brings his petition under § 14, while no such damage can be allowed him if he brings his petition under §§ 12 and 13. It cannot be supposed that the Legislature intended to prescribe one rule of damages for a property owner who brings his suit in the Superior Court, and a different rule for the same injury if he brings his petition for the appointment of a commission in

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the Supreme Judicial Court. In either mode of proceeding, if either party desires it, the assessment is ultimately to be made by a jury. See § 15. *Sawyer* v. *Commonwealth*, 182 Mass. 245, 249. Whether the petition is brought before the Superior Court or the Supreme Judicial Court, the case before the jury is the same. We must, therefore, consider the statute as prescribing the same rule for the assessment of damages under each section, unless we find a plain provision to the contrary.

The fourth and fifth classes of cases mentioned in § 14 differ from the others. They include only real estate within a certain prescribed part of the territory affected by the statute. For these a different rule of damages is prescribed. The reasons for making such a rule are stated in the report of the State board of health to the Legislature of 1895, pages cxxvi, cxxvii. Under the provision in the last part of this section every owner of an established business in West Boylston is to be compensated if his business is decreased in value by loss of custom or otherwise, and by the St. 1898, c. 551, § 1, a similar provision is made for persons in Boylston, and by Sts. 1897, c. 445, § 1, and 1901, c. 505, § 1, the provision is extended to a part of the town of Sterling and a part of the town of Clinton. These are the only parts of the statute which mention business in express terms. In the fourth class of cases mentioned in the section, compensation is to be given if real estate within the prescribed limits not taken is "directly or indirectly decreased in value" by the taking of the board under the act. This is a provision for the payment of indirect, remote and consequential damages which are not allowed in ordinary cases, when property is taken under the right of eminent domain. *Fairbanks* v. *Commonwealth*, 183 Mass. 373. *Burnett* v. *Commonwealth*, 169 Mass. 417. These damages may include an injury to business as one of the elements of the indirect decrease in value of the property. Where whole villages are submerged and populous places are made desolate there is such a change in external conditions as may greatly affect the value of property for use in business, although the property itself is not directly injured. The petitioner's property is not in Boylston or in the designated part of Clinton.

To sustain the contention that damage to business should be allowed under this section in all cases of injury to real estate

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outside of the prescribed limits, as well as within them, would render nugatory and meaningless the special provision for indirect, remote and consequential damages in cases of the fourth class above mentioned, and the express provision for damages to business near the end of the section and in the subsequent statutes which we have cited.

We are of opinion that the direction to commissioners to "determine the damage to and value of real estate, machinery and business," must be interpreted to mean value of real estate when real estate is taken, and damage to real estate and machinery when the real estate and machinery are not taken but are damaged, and the damage to business in those cases where damage to business is provided for by the statute, leaving damages to be assessed in the usual way where no special provision is made.

As the petitioner's property does not fall within either of the cases in which an assessment for damages to business is authorized, the amount in question cannot be allowed.

Judgment for the respondent.

WILLIAM A. WISHART *vs.* JOSEPH McKNIGHT.

Worcester. September 29, 1903. — October 21, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Disseisin.

Where a strip of land is enclosed by a fence as if it belonged to an adjoining dwelling house and lot, and always is used with the house, which cannot be entered without passing over it, and the strip is not occupied or used otherwise than with the house, if the owner of both the strip and the house sells the house while a tenant is in possession of it and gives a deed which does not include the strip, it may be inferred, that possession of the strip was given by the landlord to the tenant, and afterwards was surrendered by the tenant to the landlord, and that, upon the sale of the house, possession of the strip was transferred to the purchaser with the seisin and possession of the house and thenceforth was adverse to the landlord.

Where a strip of land, enclosed with a dwelling house and lot, is occupied and used by successive grantors of the dwelling house and lot as if belonging to the premises, although not included in the description in any of the deeds, the maintenance of possession of the house and strip by the successive owners as if they

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belonged together, creates a presumption of fact that the seisin and possession of the strip was in each case transferred at the same time as the seisin and possession of the house and lot.

WRIT OF ENTRY, dated July 20, 1897.

After the decision reported in 178 Mass. 356, there was a new trial in the Superior Court before *Pierce*, J. He found for the tenant; and the demandant alleged exceptions.

H. Parker, C. C. Milton & H. H. Fuller, for the demandant.

J. W. Corcoran, W. B. Sullivan & A. G. Buttrick, for the tenant.

KNOWLTON, C. J. This is a writ of entry to recover a strip of land about ten feet wide, extending back from the line of the street between the dwelling houses of the parties. The case has previously been before us on exceptions which appear in 178 Mass. 356, where may be found with the statement of facts, a plan of the locus. The present exceptions are to the refusal to make certain rulings requested by the demandant, which relate to the sufficiency of the evidence to support a finding of the acquisition by the tenant of a title by disseisin. The tenant has not personally maintained the possession relied on so long as twenty years, but the evidence tended to show that he and his predecessors in title together held possession considerably more than twenty years. At the former hearing we decided that there might be such a transfer of possession of this property by the successive grantors and occupants of the adjacent premises with which this strip was used, as would make a continuity of possession, by which, at the expiration of twenty years, a valid title by disseisin and limitation would be acquired. The several requests for rulings that there could be no finding for the tenant, rest mainly upon two propositions, namely: first, an assumption that the occupation and use were originally permissive and that there was no evidence that until very lately they became adverse; and secondly, upon the contention that there was no such evidence of an immediate succession of proprietors and a transfer of possession as would create a continuity of adverse occupation within the meaning of the law.

The situation was unusual. There was no door in the front wall of the tenant's house, next the street; the house was erected very near the line of the lot on the westerly side, and the only

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access to it was over this strip that ran down from the street on the easterly side, by a side door which was entered by two steps, and that also ran by the rear corner of the house to the back yard, in which was a small building. The steps at the side door were upon the demanded premises, which are separated from the demandant's house lot by a fence running back from the street, erected prior to the year 1873. The evidence tended to show that in 1873 the tenant's property, with the strip in question up to the fence, was occupied by a tenant of one who then owned the estates of both the demandant and the tenant, and that on July 6, 1874, the present tenant's predecessor in title, took a deed of the estate now described in the tenant's deed, which did not include the strip in question, and that the tenant and his predecessors in title have occupied and claimed under that deed ever since, and that the strip has been occupied and used all this time to the line of the fence, as if it belonged to the estate conveyed by the deed. So long as both estates were owned by the same person, and the present tenant's estate with the adjoining strip was occupied by a tenant of the owner of the whole, it might fairly be inferred that the use of the strip was permissive and not adverse; but immediately upon the separation of the estates by a deed to the tenant's predecessor in title, and upon an attornment to the new owner, the relations of the parties were changed, and possession and use of this strip in connection with the present tenant's estate would no longer be imputed to the former tenancy from the demandant's predecessor, but presumably would be adverse to the former landlord, the holder of the title. We think there was ample evidence to warrant a finding that the possession, if permissive originally, was adverse after the termination of the tenancy by the conveyance to the present tenant's predecessor in title.

To warrant a finding that there was a continuity of possession, we do not deem it necessary to show by express testimony that the new occupant was personally present upon the premises before the former occupant departed, and that there was a formal manual transfer of possession of this strip as a part by itself. There is a fair inference that a tenant, on his departure at the expiration of his term, surrenders the possession to his landlord, and that their possession is continuous, or rather, that the pos-

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session of the owner is continuous, although the two do not meet personally upon the premises at the end of the term. The possession of the tenant is the possession of the landlord. When we find a strip of land so situated in reference to an adjacent dwelling house and lot that the house cannot be entered or used without passing over the strip, and that the strip is fenced off from other lands as if belonging to the house, and is always used with it when the house is used, and is not occupied or used otherwise than with the house, and is always claimed by the occupant and the owner of the house as property belonging with it, it may fairly be inferred that the possession of the strip is given by the landlord to the tenant, and afterwards surrendered by the tenant to the landlord, and that upon a sale of the house and lot, possession of this land which is treated as belonging to the house, is transferred with the seisin and possession of the house. See *Leonard* v. *Leonard*, 7 Allen, 277; *Ammidown* v. *Ball*, 8 Allen, 293; *Pettingill* v. *Porter*, 8 Allen, 1; *Sargent* v. *Ballard*, 9 Pick. 251; *Melvin* v. *Whiting*, 13 Pick. 184; *Allen* v. *Scott*, 21 Pick. 25, 29; *Jordan* v. *Riley*, 178 Mass. 524; *Percival* v. *Chase*, 182 Mass. 371, 376; *Beckman* v. *Davidson*, 162 Mass. 347, 350.

The maintenance of possession of the house and the strip by all the successive owners as if they belonged together, furnishes a presumption of fact that the seisin and possession of one part was transferred at the same time as the seisin and possession of the other part. After a recital of evidence excluded, it is said in the former opinion in this case that "This evidence would have warranted the jury in finding that each of the grantees transferred to his successor his possession of the strip of land in question, and that thereby the demandant was continuously kept out of possession." This evidence was introduced in convincing form at the last trial.

The evidence indicates that the possession relied on was adverse and under a claim of right. *Wheeler* v. *Laird*, 147 Mass. 421. *Bodfish* v. *Bodfish*, 105 Mass. 317. *Samuels* v. *Borrowscale*, 104 Mass. 207. *Holloran* v. *Holloran*, 149 Mass. 298.

We do not deem it necessary to consider the requests for rulings more particularly. There was no error in the refusal to grant them.

Exceptions overruled.

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JOHN MAHONEY *vs.* BAY STATE PINK GRANITE COMPANY.

Worcester. September 29, 1903. — October 21, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Negligence, Employer's liability.

A person employed in a stone quarry, who gave directions to twenty-two men employed there, sometimes discharged men, marked with chalk lines the places where drilling was to be done by the workmen, and never drilled himself, may be found to have been a superintendent whose sole or principal duty was that of superintendence within the meaning of the employers' liability act, although there was another superintendent of the whole business, who was not in the habit of staying at the quarry and sometimes did not come there for a whole day.

The proprietor of a stone quarry may be found to be liable to a workman in his employ injured by the slipping of a large stone on which the plaintiff was at work by order of the defendant's superintendent, drilling a line marked by the superintendent, if the slipping of the stone was due to the negligence of the superintendent in placing the stone in position by means of a derrick worked by two men under his direction, it having been the superintendent's duty to determine where and how the stone should be placed for work to be done upon it.

A workman in a stone quarry injured by the slipping of a large stone on which he was at work by order of the defendant's superintendent, drilling a line marked by the superintendent, may be found to have been in the exercise of due care, if the accident was caused by the negligence of the superintendent in placing the stone in position by means of a derrick, and the plaintiff was not present when the stone was put in position and his attention was not directed to the risk of its slipping. He might treat the direction to work upon the stone as an implied assurance that he could work there safely, from one who ought to know.

A workman in assuming the ordinary risks of his employment does not assume a risk caused by the negligence of a superintendent.

A workman in a stone quarry, obeying the order of a superintendent to get upon a large stone and drill a line marked upon it by the superintendent, does not assume the risk of an injury from the slipping of the stone caused by the negligence of the superintendent in placing the stone in position by means of a derrick when the workman was not present.

TORT, under the employers' liability act, for personal injuries received while working in the defendant's granite quarry at Milford. Writ dated October 14, 1901.

At the trial in the Superior Court before *Hardy*, J., without a jury, the judge found for the plaintiff in the sum of $500. The defendant alleged exceptions.

C. C. Milton & D. F. Gay, for the defendant.

J. W. Corcoran & W. B. Sullivan, for the plaintiff.

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KNOWLTON, C. J. The defendant excepted to the refusal of the judge to make certain rulings requested. The judge found for the plaintiff on the first count which charges an injury to the plaintiff caused by the negligence of Halligan, the defendant's superintendent, while the plaintiff was in the exercise of due care. If there was any evidence to support this count, the rulings requested were rightly refused.

There was abundant evidence to warrant a finding that Halligan was a superintendent whose sole or principal duty was that of superintendence within the meaning of the statute. There were about twenty-two men at work on the quarry at this place, and Halligan was the "boss" who was accustomed to give directions to all these men. There was testimony that he had sometimes discharged men. There was another superintendent of the whole business, but there was testimony that he was not in the habit of staying at the quarry, that sometimes he did not come for a whole day, and that "Halligan was the only man who gave directions." Besides this, he was accustomed to mark with chalk lines the places where drilling was to be done, but he never drilled himself. *Crowley* v. *Cutting*, 165 Mass. 436. *Reynolds* v. *Barnard*, 168 Mass. 226. *O'Brien* v. *Look*, 171 Mass. 86. *Prendible* v. *Connecticut River Manuf. Co.* 160 Mass. 131. *McCabe* v. *Shields*, 175 Mass. 438.

The evidence tended strongly to show that he was negligent in putting in position the stone on which the plaintiff was working at the time of the injury. According to the plaintiff's testimony, this stone was about six feet square and about five feet high, and it must have weighed several tons. The work was done with a derrick by two men who were acting under Halligan's direction, and who put the stone where he told them to put it. Both of them testified that when it was put there one of them told him it was not all right. According to one of the witnesses, the man at the derrick said, "There are a good many chips under the stone, and I don't think the stone is going to stay there," and that Halligan replied, "We will leave it there, swing your derrick around." The bed of the quarry was somewhat sloping, and there were many chips of broken stone of different sizes lying upon it, and according to the evidence, these left the large stone in a sloping position. Afterwards Halligan

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ordered the plaintiff and two other men to get upon it and drill some lines which he had marked upon it. While they were at work at drilling, it slipped about fifteen feet and injured the plaintiff. The evidence tends to show that it was the duty of Halligan to determine where and how the stone should be placed for the work to be done upon it. So far as appears, he was the only person who had any duty or responsibility in regard to that. Apparently it would have been easy to prepare a place for it, on which it would have rested firmly. The judge might well find him guilty of negligence which caused the accident. *Malcolm* v. *Fuller*, 152 Mass. 160. *Dean* v. *Smith*, 169 Mass. 569. *Hennessy* v. *Boston*, 161 Mass. 502.

There was evidence from which it might be found that the plaintiff was in the exercise of due care. He was in the performance of his duty in obedience to Halligan's order. He was not there when the stone was put in position, and his attention was not directed to the risk of its slipping. According to the testimony, he could not see under the stone, although he might have known that there were some chips under it. It does not appear that it was possible for him to see the size and shape and quantity of the chips, so as to determine whether the stone was likely to slip. Primarily, it was not his duty to make a careful inspection of everything pertaining to the safety of the place where he was directed to work. He might well trust something to the superintendent. It was his primary duty immediately to obey Halligan's order to go upon the stone and drill the line.

Moving the large stones with a derrick and putting them in place to be finished was not in the line of duty of the men employed to drill. It was a part of the business which properly could only be done by their employer, or by the superintendent representing him. Interference of workmen in that department of the business might have been resented by the superintendent. It was the plaintiff's duty to work at drilling where he was told to work. Of course, if he knew of a danger that should be guarded against, he could not carelessly expose himself to it at his employer's risk, and if there was danger so obvious and so great that the exercise of due care would disclose it to him, and would show him that he ought to avoid it, he was bound to refrain

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from improperly exposing himself; but he might treat the direction to work upon the stone as an implied assurance that he could work there safely, from one who ought to know.

In assuming the ordinary risks of the business he did not assume risks caused by the negligence of a superintendent. *Hennessy* v. *Boston*, 161 Mass. 502. *Dean* v. *Smith*, 169 Mass. 569. *Malcolm* v. *Fuller*, 152 Mass. 160. *Crowley* v. *Cutting*, 165 Mass. 436.

Exceptions overruled.

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HANNAH M. GLEASON, administratrix, *vs.* WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

Worcester. September 29, 1903. — October 21, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Negligence, Contributory.

If a person engaged in operating a stationary engine, used in constructing a sewer in a street, two feet from the track of an electric railway, steps upon the track directly in front of an approaching car eight or ten feet away, and is struck and killed by the car without regaining consciousness, no recovery can be had for his death without affirmative proof that he was exercising care to avoid being struck by the car.

TORT for the death of the plaintiff's intestate from being run over by a car of the defendant. Writ dated December 18, 1901.

At the trial in the Superior Court *Sheldon*, J. at the close of the plaintiff's evidence ordered a verdict for the defendant. The plaintiff alleged exceptions.

H. L. Parker, Jr., for the plaintiff.

C. C. Milton, (*C. Bullock* with him,) for the defendant.

BARKER, J. The action is for damages for causing the death of the plaintiff's intestate who was struck and killed by one of the defendant's cars. As he was not a passenger, even if the defendant was guilty of negligence, or the defendant's servants were guilty of gross negligence in causing the death, the plaintiff cannot recover without affirmative evidence sufficient to justify a finding that her intestate was in the exercise of ordinary care.

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If from the evidence the inference that he exercised ordinary care can be only conjectural the question ought not to be submitted to a jury. *Creamer* v. *West End Street Railway*, 156 Mass. 320. *Mathes* v. *Lowell, Lawrence, & Haverhill Street Railway*, 177 Mass. 416. *Cox* v. *South Shore & Boston Street Railway*, 182 Mass. 497, 499, and cases cited.

The plaintiff's intestate was employed in operating a stationary engine and air compressor used in constructing a sewer in the street. The sewer trench was parallel with the defendant's tracks and between them and the sidewalk, and the sides of the trench were sustained by sheathing which came above the surface of the street. The edge of the trench was about two feet from the nearest track. The engine and compressor were at the northerly end of the trench, and the place where the plaintiff's intestate stood when operating them was about two feet from the nearest rail of the nearest track. Northerly of the boiler of the apparatus was a shield of boards two or three feet square to catch any oil flying from the compressor, and this shield was nearly parallel with the track and about eighteen inches from the rail, and between the edge of the shield and the boiler was just room for passage. The plaintiff's intestate could not reach the other side of the compressor nearest the sidewalk except by going out on to the street and going round the end of the compressor.

The occupation of the plaintiff's intestate confined him substantially to a single spot in which he stood with his face toward the north and it was necessary for him to have his hand on the throttle a good part of the time in order to control his engine. It was sometimes necessary to oil certain parts of the apparatus, but he was not engaged in oiling at the time, and there was nothing shown that would call him away from his engine, and no evidence that anything about his work required him to go between the rails of the track. Just before the accident he had gone around the boiler and had some talk with the fireman after which they both turned to their work. While they were talking the plaintiff's intestate was looking southerly down the track toward the car which afterwards struck him and which the fireman testified that he (the fireman) saw about three hundred feet away as he turned to his work. The

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fireman had just turned to his work and had only time to move a valve when the car flew by and struck the plaintiff's intestate who had stepped out upon the track at a point just opposite the wooden shield. The car knocked him down and carried his body under the wheels and fender sixty feet up the track, which was upon an up grade of five per cent. There was conflicting evidence as to the rate of speed, and the evidence would have justified a finding that the rate was anywhere from four to fifteen miles an hour. The plaintiff's intestate was unconscious until his death. Besides the testimony of the fireman, there was that of the motorman of the car, and also that of a traveller on the street, who testified that he was driving northerly, that the plaintiff's intestate was standing beside his engine, and then when the car was eight or ten feet away stepped out upon the track and turned north and that he had just stepped upon the track when the car was upon him, and that he turned half round to the right and put his hand up in front of the car.

The motorman testified that he saw a man step on to the track from behind the engine about eight feet in front of the car. The fireman testified that the car was going eight or nine miles an hour, the motorman that it was going four or five miles an hour and that he was ringing his gong all the time, and that as soon as he saw the man he shut off the power, turned on the whole reverse power and put on the full force of the emergency air brake. The traveller testified that the car was going fifteen miles an hour, and that he heard the gong when the car was at Kendall Street three hundred feet away. Twenty minutes after the accident the fireman found the throttle of the compressor wide open, although he never knew the plaintiff's intestate to leave his work unless he shut down his engine before.

To step from a place of safety only two feet away upon the track of an electric street railway directly in front of and only eight or ten feet from an approaching electric car, whether the car is approaching at the rate of four, or five, or eight or nine miles, or fifteen miles an hour is not evidence of care on the part of the person who does the act. It may or may not be consistent with ordinary care. If the person who does it is struck by the car and killed no recovery can be had for his death without affirmative proof that he was exercising care to avoid being hit.

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Assuming from the fact that the plaintiff's intestate left his engine without shutting it down, that he had occasion to pass in the street around the shield to the other end of the compressor, he knew that a car might at any time come up the street behind him and that if he placed himself within the space it would cover he might be hit unless he got out of the way. If we also assume, as the plaintiff contends could be inferred fairly, that he had just seen the approaching car as he was looking towards it while talking with the fireman, he had had actual knowledge that a car was then approaching. His conduct in stepping on to the track within eight or ten feet of the car is as consistent with the theory that he had not seen the car and went upon the track without taking any care to avoid being hit, or that he had forgotten that it was approaching and so took no care or precaution, as with the theory that he had the danger in mind, and thought that he had time to enter upon the track and still get out of the way of the car. Either inference is purely conjectural. In our opinion the verdict for the defendant was ordered rightly because there was no sufficient or affirmative evidence that the plaintiff's intestate exercised care. See *Kelly* v. *Wakefield & Stoneham Street Railway*, 175 Mass. 331; *Hurley* v. *West End Street Railway*, 180 Mass. 370.

This view makes it immaterial whether the evidence offered by the plaintiff and excluded, to show negligence on the part of the defendant was excluded rightly.

Exceptions overruled.

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SELECTMEN OF GARDNER *vs.* TEMPLETON STREET RAILWAY COMPANY.

SAME *vs.* SAME.

INHABITANTS OF GARDNER *vs.* SAME.

Worcester. September 30, 1903. — October 21, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Street Railway. Equity Jurisdiction. Equity Pleading and Practice, Parties. *Mandamus.*

Under St. 1898, c. 578, § 13, (R. L. c. 112, § 7,) the selectmen of a town, in granting an original location to a street railway company, may prescribe that the company at its election can use from one designated point to another a cheaper rail without granite paving, on condition that if that portion of the road proves unsatisfactory to the selectmen, they, within a specified time, may order the track removed and a certain more expensive rail with granite paving to be substituted, and an order of the selectmen requiring such removal and substitution will be enforced in a suit in equity brought under St. 1898, c. 578, § 25, (R. L. c. 112, § 100.)

The obligation of a street railway company to construct its road in accordance with its original grant of location, imposing certain conditions as to paving its roadbed, is not affected by the exemption contained in St. 1898, c. 578, § 11, (R. L. c. 112, § 44,) as to making repairs on the surface of streets.

In a suit in equity by the selectmen of a town against a street railway company, under St. 1898, c. 578, § 25, (R. L. c. 112, § 100,) to enforce an order of the plaintiffs as to the construction of the defendant's road in accordance with the grant of location, it is immaterial that the defendant is financially embarrassed and is not able to carry out the order of the plaintiffs.

If the selectmen of a town in granting a location to a street railway company under St. 1898, c. 578, § 13, (R. L. c. 112, § 7,) prescribe that the work shall be done to their satisfaction, their determination, at least in the absence of fraud, is final, and it is immaterial whether they ought to have been satisfied or not.

Under St. 1898, c. 578, § 25, (R. L. c. 112, § 100,) the selectmen of a town are the proper parties to bring a bill in equity to compel the enforcement of an order made by them as to the construction of the road of a street railway company in accordance with the grant of location.

A writ of mandamus will not be granted to enforce a right given by statute for which an adequate and effectual remedy in equity is provided by statute.

BILL IN EQUITY, by the selectmen of the town of Gardner, to enforce a condition contained in the original location granted to the defendant, praying for a mandatory injunction ordering the defendant to take up a certain portion of its track, and substitute

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therefor girder rails with granite block paving between the rails and for eighteen inches outside thereof.

In the Superior Court *Gaskill*, J. excluded certain evidence offered by the defendant and refused to give the rulings requested by the defendant. He reported the case for determination by this court. If any of the evidence offered by the defendant was competent and in the opinion of this court could materially affect the determination of the case, the case was to be sent back to the Superior Court for a hearing; otherwise, such decree was to be entered as this court should deem proper.

Also TWO PETITIONS for writs of mandamus, to enforce the same order, one by the selectmen of Gardner and the other by the town of Gardner.

To both petitions the respondent demurred. These cases were heard by *Loring*, J., who sustained the demurrers and dismissed the petitions. The petitioners appealed.

J. A. Stiles, for the plaintiffs.

W. A. Buie & C. F. Eldredge, for the defendant.

LORING, J. On July 18, 1899, the selectmen of Gardner, acting under St. 1898, c. 578, (now R. L. c. 112,) granted to the defendant a location in the public highways within that town. It is provided by § 13 of this act, (now R. L. c. 112, § 7,) that in case they are of opinion that public necessity and convenience require the granting of the location, the selectmen may "prescribe how the tracks shall be laid and the kind of rails," and other appliances which shall be used, and that they may "impose such other terms, conditions and obligations in addition to the general provisions of law governing such companies as the public interest may in their judgment require."

Acting under this section, the selectmen prescribed in the third article of the location that the company should use a T rail with two exceptions; in case of the first exception the selectmen prescribed that from one point to another point therein specified a girder rail should be used, and in case of the second exception it was provided that between two other specified points "if the road . . . prove unsatisfactory to the selectmen, the board may at any time within two years from the completion of the road order that portion of the track laid under this location and lying

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between said crosswalk and the brook next westerly to be taken up and girder rails substituted therefor, with granite block paving between the rails and for eighteen (18) inches outside thereof."

On June 11, 1901, the board, after hearing, determined "that the track of said street railway company" between the points specified in the second exception, "is not satisfactory," and directed the defendant, in compliance with the third article of its grant of location, to "take up its track now laid between the aforesaid crosswalk and the aforesaid brook and substitute therefor a track laid with nine (9) inch girder rails, with granite block paving between the rails and for eighteen (18) inches outside the same. The entire work to be done and the street to be left in a condition satisfactory to this board." This the company refused to do, and a bill in equity was brought under R. L. c. 112, § 100, to compel the observance of this order of the selectmen. We are of opinion that it is well brought.

The defendant's first contention is that when the selectmen had prescribed what the original construction of the road should be their power was exhausted and this provision was void. But we are of opinion that in prescribing the original construction the selectmen could prescribe that the company at its election could use a cheaper rail without granite paving within the rails and for eighteen inches outside, on condition that if that construction did not prove satisfactory to them it should be changed within a specified time and the more expensive construction carried into effect by the railway. This bill is brought not to enforce a contract between the railway and the town, as the defendant contends, but to compel the observance by the railway of this "order" made by the selectmen of the town of Gardner in accordance with the provisions of what is now R. L. c. 112, § 100.

The payment by the defendant of the excise tax under what is now R. L. c. 14, §§ 43–47, exempts it from making repairs on the public ways, (R. L. c. 112, § 44,) but it has nothing to do with its duty to construct the road in compliance with the grant of location.

There was nothing in the long offers of evidence made by the defendant. It was immaterial that the present owner of this

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street railway is financially embarrassed and is not able to carry the order of the selectmen into effect. The fact, if it was a fact, was also immaterial that the selectmen ought to have been satisfied with the T rail. It is competent for selectmen, acting under R. L. c. 112, § 7, to prescribe that the construction shall be done to their satisfaction. If they do so prescribe, their determination, at least in the absence of fraud, is final and cannot be transferred to or controlled by the court. (See in this connection *Rice* v. *Middlesex Commissioners*, 13 Pick. 225.) It was not competent to vary and control the written grant of a location by evidence of what was orally agreed upon between the selectmen and the defendant.

We are of opinion that R. L. c. 112, § 100, makes the selectmen the proper parties plaintiff to bring a bill under that act to compel observance of an order made by them in compliance with the act as to the construction of the railway in a public highway within their jurisdiction. For that reason *Needham* v. *New York & New England Railroad*, 152 Mass. 61, and *Winthrop* v. *New England Chocolate Co.* 180 Mass. 464, do not apply.

By the true construction of the second article all work of construction is to be done to the satisfaction of the selectmen.

We are of opinion that a mandatory writ of injunction should issue in the terms of the order of the selectmen made on June 11, 1901.

In addition to the bill in equity brought by the selectmen of Gardner, we have before us appeals from judgments dismissing two petitions for a writ of mandamus, one brought by the selectmen and one by the inhabitants of Gardner.

These appeals are material only on the question of costs. The selectmen are not entitled to costs in this court in any event. They cannot have a remedy by mandamus in addition to a remedy by a bill in equity and by pursuing the bill in equity they have made their election.

But the town is entitled to costs if their petition was well brought. We are of opinion, however, that it was not. The writ of mandamus is an extraordinary remedy granted only where it is necessary to prevent a failure of justice, and where there is no other adequate and effectual remedy. *Carpenter* v. *County Commissioners*, 21 Pick. 258. *Lexington* v. *Mulliken*,

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7 Gray, 280. *Murray* v. *Stevens*, 110 Mass. 95. *Stackpole* v. *Seymour*, 127 Mass. 104. *Attorney General* v. *Boston*, 123 Mass. 460, 471. *Wheelock* v. *Auditor of Suffolk County*, 130 Mass. 486.

The petitioners contend that the remedy here in question is a remedy in equity, and that the rule in question refers to an adequate and effectual remedy at law. However that may be where mandamus is asked for to enforce a common law right, it does not apply to a right given by statute for the enforcement of which a special statutory remedy is provided which is adequate and effectual even if that statutory remedy be on the equity side of the court. *Perry* v. *Hull*, 180 Mass. 547. *State* v. *Manchester & Lawrence Railroad*, 62 N. H. 29. See also in this connection *Jefferson* v. *Board of Education*, 35 Vroom, 59; *Sabine* v. *Rounds*, 50 Vt. 74; *Brennan* v. *Butler*, 22 R. I. 228.

The town urges that it is or was doubtful whether the court would interfere to compel the observance of such an act as is here in question, and relies on *Newcomb* v. *Norfolk Western Street Railway*, 179 Mass. 449. But here the court is not asked to compel specific performance of continuous acts, as it decided in *Newcomb* v. *Norfolk Western Street Railway*, it would do in case of an order under what is now R. L. c. 112, and here as in that case the work is to be done to the satisfaction of a public officer. The entry must be

Decree for plaintiffs in bill in equity; judgment dismissing petitions for mandamus affirmed with costs.

ELLEN McLAUGHLIN, administratrix, *vs.* SUPREME COUNCIL CATHOLIC KNIGHTS OF AMERICA.

Worcester. September 30, 1903. — October 21, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Fraternal Beneficiary Association. Contract, Implied.

The rules of a beneficiary association required a member applying for reinstatement, after a suspension of more than thirty and less than ninety days, to pay all arrearages and a reinstatement fee, and to "furnish the branch, the medical examiner's certificate as prescribed for persons on original application." The

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rules for original application required the medical examiner's certificate to be made upon a certain form and to be transmitted sealed to the supreme medical examiner whose approval was required. A member thus suspended paid all arrears and the reinstatement fee, and was examined by a local medical examiner, who made a certificate upon the prescribed form, but, instead of sealing it and transmitting it to the supreme medical examiner, gave it to the member, who delivered it to the branch. The certificate was not received by the supreme medical examiner until after the death of the member, and was never approved by that examiner. *Held*, that the medical examiner's certificate to be furnished the branch as a condition of reinstatement was a certificate approved by the supreme medical examiner; therefore, that the member at the time of his death was not in good standing, and his administrator could not recover on a certificate which made the association liable only upon proof of the member's death in good standing in the order. *Held, also*, that the association was not estopped by delay in forwarding the certificate from setting up this defence, as the possibility of the delay came from the intestate's own act in receiving the certificate and giving it to the local branch.

Upon the death of a member of a fraternal benefit association, who was suspended for failure to pay dues and assessments and was not reinstated at the time of his death, his administrator cannot recover from the association the sums paid as assessments by the intestate before his suspension.

BARKER, J. This is an action at law, in contract, against a fraternal beneficiary order to recover upon a benefit certificate. There is also a count for money received, and the plaintiff contends that if not entitled to maintain her action on the benefit certificate, she can recover the amount paid into the treasury of the order by the deceased member, who was her husband, and of whose estate she is the administratrix.

He became a member of the order in February, 1896, when the benefit certificate was issued. By it the defendant agreed to pay, upon due proof of the member's death, "he being in good standing in the order," the sum of $1,000, and the intestate agreed to pay "all assessments, dues and fines assessed against him, according to the laws, rules and regulations of the . . . Supreme Council, which may now or hereafter govern the order." After numerous small payments, he was, on November 2, 1900, suspended from membership for failure to pay dues and assessments. On January 14, 1901, he applied for reinstatement. This application was more than thirty and less than ninety days after his suspension. The rules require that a suspended member applying for reinstatement shall pay up all arrearages and a reinstatement fee, and, if he has been suspended for less than thirty days, shall also "furnish the branch an

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affidavit that he is in sound health and has had no ailment during his suspension," and if he has been suspended more than thirty and less than ninety days, shall "furnish the branch, the medical examiner's certificate as prescribed for persons on original application."

The rules require the medical examiner's certificate, in case of an original applicant, to be made upon a certain form, and to be transmitted by the local examiner, sealed up, to the supreme medical examiner, who in turn, if he approves the certificate and recommends the applicant as a fair risk, shall transmit the certificate, with his approval indorsed thereon, to the supreme secretary. The supreme medical examiner has power by the rules to approve or reject all such certificates, and from his decision there is no appeal.

On making his application for reinstatement on January 14, 1901, the intestate paid to the local lodge all arrears of dues and assessments and the reinstatement fee, his whole payment upon that day amounting to $8. On February 6, 1901, he was personally examined by a local medical examiner of the order, who made a certificate of the examination upon the prescribed form, but did not seal it up nor transmit it to the supreme medical examiner, but gave it to the intestate who, on or about the same day, delivered it to the branch.

The intestate died on February 20, 1901. The medical examiner's certificate which he had delivered to the local branch on February 6, 1901, was received from that branch by the supreme medical examiner on April 23, 1901, was not approved by him, and on the next day was returned by him for correction to the secretary of the branch, the supreme examiner not knowing the address of the local examiner who had made it. It never was returned to the supreme examiner, never approved by him, and never transmitted to the supreme secretary.

It appears from the answers of the supreme secretary to interrogatories filed by the plaintiff, that he did not issue new certificates to reinstated members, but that the reinstatement revived the old certificate, and he further stated that the plaintiff's intestate was not reinstated because he had not furnished the medical examiner's certificate required in the rule.

The plaintiff asked the judge to direct a verdict in her favor

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for the sum of $1,000, the amount mentioned in the benefit certificate, and also contended that if not entitled to that verdict the jury should be instructed to return one in her favor for the sum of $127.72, the amount of all the payments made to the order by her intestate as set forth in her count for money had and received. The defendant asked the judge to direct a verdict for the plaintiff for the sum of $8, the amount paid on the intestate's application for reinstatement, on the ground that the plaintiff had not proved that her intestate was a member of the order at the time of his death, and that therefore the plaintiff could not recover in excess of the amount paid by the intestate to the local branch for reinstatement. The judge ordered a verdict for the plaintiff for $8, and the case is here upon her exceptions.

The promise to pay the $1,000 was conditioned upon the member's being in good standing at the time of his death. *Lyon* v. *Royal Society of Good Fellows*, 153 Mass. 83. He died on February 20, 1901, having been suspended from the order on November 2, 1900. His application for reinstatement and his payment of arrearages and a reinstatement fee on January 14, 1901, did not of themselves work a reinstatement, because he did not then furnish any medical examiner's certificate. As a full compliance with the rules governing reinstatements would of itself work his reinstatement without the issuing of a new certificate, the decisive question is whether his giving to the local branch on February 6, 1901, the local medical examiner's certificate was, with his previous application and payments, a complete compliance with the rule. No assessment is shown to have been made upon him and no payment to have been made by him after January 14, 1901, from which to infer estoppel or waiver. See *Campbell* v. *Knights of Pythias*, 168 Mass. 397. All that was done by him, by the local branch, or by any officer or member of the order, after that date and before his death, was for him to submit, on February 6, to a personal examination by the local medical examiner, for that officer to make out a report of the examination on the proper form, and for the intestate to deliver that report to the local branch.

If a fair construction of the rules required that the local medical examiner's report before becoming an effectual compliance

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with the rule so as to work a reinstatement should be approved by the supreme medical examiner, that approval was not secured before the intestate's death, and in fact never was secured. In the language of the rule the medical examiner's certificate which the intestate as an applicant for reinstatement was to "furnish the branch" was a "medical examiner's certificate as prescribed for persons on original application." This was to be made in the first instance by the local examiner and to be by him sealed up and transmitted to the supreme medical examiner, then, if approved by him, indorsed with such approval and transmitted to the supreme secretary. It is clear that no such certificate could under the rules be sufficient to entitle an original applicant to insurance until approved by the supreme medical examiner. We think that the rule as to reinstatement puts an applicant for reinstatement who has been suspended for more than thirty days upon the same footing as an applicant for original insurance, so far as the medical examiner's certificate is concerned. It is no answer to this construction that it required of the intestate something which he could not furnish without the action of other persons. It was for him to effect his own reinstatement, and if he did not cause to be done the necessary acts his reinstatement would not be accomplished, and the defence that he was not in good standing in the order at the time of his death would be open unless the doing of the necessary acts was prevented by some fault of the defendant. See *Audette* v. *L'Union St. Joseph*, 178 Mass. 113.

The chief purposes of the rule as to reinstatement were first, to insure the payment of all money which the applicant would have paid if he had kept his standing good, and secondly, that the forfeiture of rights under the benefit certificate should not be taken off unless the applicant was in good health at the time of his reinstatement, and had suffered no illness during his suspension. Both of these objects it was as important to secure in the case of men who had been under suspension for more than thirty days, as in the case of those who had been suspended more recently. Even in the case of those who had been suspended for less than thirty days, the applicant must furnish proof by affidavit that he is in sound health at the time of applying for reinstatement and has had no ailment during his suspension.

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If a suspended member is taken ill within thirty days after suspension and before applying for reinstatement, he cannot successfully apply for reinstatement within that time, because he cannot make the required affidavit. It would be absurd that he could apply after the expiration of the thirty days, and by submitting to an examination which might show that he was then dying of a fatal illness, and, by merely delivering to the branch the local examiner's report of that examination, effectually work his own restoration to good standing in the order. We therefore think that "the medical examiner's certificate as prescribed for persons on original application" which he must "furnish the branch" is a certificate approved by the supreme medical examiner.

Nor should the defendant be estopped by the delay which in the present instance occurred in the forwarding of the certificate to the supreme examiner. The possibility of the delay came from the intestate's own act. Certificates on original examination are to be sent to the supreme examiner by the local examiner. The intestate himself, instead of seeing that this course was pursued, took the certificate from the local examiner and gave it to the local branch. He should have declined to receive the certificate and have caused or allowed it to take the usual course of a certificate made on an original examination. There is no ground for finding bad faith on the part of the local examiner, the branch, or the defendant itself or its supreme officers. It was a misfortune that the intestate mistook the true construction of the rule, and so interfered with the regular course in receiving the certificate from the local examiner and giving it to the branch, thereby making possible the delay of the branch in consequence of which the certificate was not acted upon by the supreme examiner until after the intestate's death.

Nor could the plaintiff recover the sums paid by her intestate before his suspension. Those payments were in accordance with the contract between him and the order, and in consideration of his membership and of the insurance which had been in force upon his life until his suspension. So far as the benefit of the payments has been lost, that result is due to the intestate's failure to comply with the obligations imposed upon him by his agreements in the original contract, and not from any fault of

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the defendant or its agents. The forfeiture arose from his own omission to make payments in compliance with his contract. See *Keefe* v. *Fairfield*, *post*, 334.

Whether the plaintiff could recover the $8 paid when her intestate applied for reinstatement is a question not raised by her exceptions.

Exceptions overruled.

F. N. Thayer, for the plaintiff.

J. H. Meagher, *E. Zaeder* & *J. P. Morrissey*, for the defendant.

AUSTIN D. MCNAMARA *vs.* COMMONWEALTH.

Worcester. September 30, 1903. — October 21, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Metropolitan Water Act. Damages.

Under St. 1895, c. 488, § 14, which provides compensation for the owners of real estate situated between certain lines in the town of Clinton, which is directly or indirectly decreased in value by that act or the doings of the metropolitan water board, the owner of real estate lying partly within and partly outside of the described territory can recover for indirect damage only to that part of his property which is within the designated boundaries.

Under those portions of St. 1895, c. 488, which provide compensation for damage caused directly by the doings of the metropolitan water board, the draining of a well by the acts of the board is a special and peculiar damage for which a landowner is entitled to compensation whether his land is taken or not.

Under St. 1895, c. 488, § 15, providing that the metropolitan water board, upon agreement or determination of damages, shall notify the landowner that they will pay the damages, "or, in case the petitioner offers to make surrender, if they so prefer, they will pay the value so agreed upon or determined", the water board, on an offer of a petitioner to surrender his land and a determination of its value by the commissioners, may elect either to take the land or to pay the damages.

PETITION, filed June 3, and amended June 22 and November 5, 1901, for the assessment of damages under St. 1895, c. 488, § 14.

The case came on to be heard before *Lathrop*, J., upon the report of commissioners theretofore appointed, and by agreement of the parties was reserved for the consideration of the full court,

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such order and disposition of the case to be made as to the full court should seem meet.

J. W. Corcoran & W. B. Sullivan, for the petitioner.

R. A. Stewart, Assistant Attorney General, for the Commonwealth.

KNOWLTON, C. J. The petitioner seeks to recover damage to his property under that clause of St. 1895, c. 488, § 14, which gives compensation to the owner of any real estate not taken but directly or indirectly decreased in value by the doings of the metropolitan water board, situated between certain lines in the town of Clinton. His estate contains about fifty square rods, with three tenement houses and sheds thereon. A part of it lies inside and a part outside of the boundaries given in the statute. The first question is whether he is entitled to damage to his entire estate or only damage to that part of it within the designated boundaries. This is a peculiar provision, giving damages which may be remote and consequential, and which are produced by causes operating only indirectly upon the property. *Fairbanks* v. *Commonwealth*, 183 Mass. 373. *Burnett* v. *Commonwealth*, 169 Mass. 417. *Nashua River Paper Co.* v. *Commonwealth*, *ante*, 279. For this reason it is only real estate within a prescribed place that was thought to be peculiarly affected by the statute which gives its owner a right to this kind of damages. We think it plain that no award can be made under this clause of the statute for damages to real estate which is not within the prescribed boundaries.

The report also shows that the acts of the water board have drained the petitioner's well on that part of his property which is outside of the lines mentioned. This appears to be a special and peculiar damage caused directly by the doings of the board, which is covered by other provisions of the statute. An earlier clause in this section gives damages to the owner "of any real estate injured by the taking of the waters of said Nashua River." Sections 12 and 13 give damages to property for all acts done under the statute, and these damages are to be determined "in the same manner as damages for lands taken for highways are determined." Under this provision there may be an allowance of special and peculiar damages which are at the same time direct and proximate, like the draining of a well, whether any part of

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the petitioner's land is taken or not. R. L. c. 48, § 15. *Parker* v. *Boston & Maine Railroad*, 3 Cush. 107. *Trowbridge* v. *Brookline*, 144 Mass. 139. *Dana* v. *Boston*, 170 Mass. 593. *Sheldon* v. *Boston & Albany Railroad*, 172 Mass. 180. *Bickford* v. *Hyde Park*, 173 Mass. 552. *Putnam* v. *Boston & Providence Railroad*, 182 Mass. 351. *Nashua River Paper Co.* v. *Commonwealth*, *ante*, 279. In *Chelsea Dye House & Laundry Co.* v. *Commonwealth*, 164 Mass. 350, which was followed in *Cabot* v. *Kingman*, 166 Mass. 403, and *Magee Furnace Co.* v. *Commonwealth*, 166 Mass. 480, the decision was put distinctly upon the ground that the cause of the damage did not come within any other of the provisions of the statute, and that the case must stand, if at all, upon the word "taking" in the metropolitan sewer act, and it was held by a majority of the court that the taking of rights in the public highway imposed no additional servitude upon the land under the highway, and was therefore not a taking within the meaning of that part of the statute. The opinions in some other cases under that act should be read with this fact in mind. So far as the petitioner has suffered damage to his property which would be recoverable if it were caused by taking land for a highway, it should be allowed under this petition, and the case should be recommitted for the assessment of such damage.

The petitioner in the petition signified his willingness to surrender his real estate, and the commission has accordingly determined its value. The question is now raised whether the Commonwealth is obliged to take it, or whether the water board may elect either to take it or to pay the damage. This question depends upon the effect of the words "if they so prefer" in the fifth and sixth lines of § 15. These words do not make it obligatory upon the board to take the property, but leave them to exercise their preference. It is only in case they prefer to take the whole that they are obliged to do more than to pay the damages.

Report recommitted.

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RICHARD J. TORPEY *vs.* WILLIAM TEBO.

Worcester. September 30, 1903. — October 21, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Bills and Notes. Evidence, Extrinsic to vary writings. *Contract*, Consideration.

An instrument, which by its true construction is an unconditional order to pay a certain sum of money at a fixed future time to the payee or order, is a bill of exchange under R. L. c. 73, § 18.

In an action on a note payable absolutely, evidence is not admissible to prove an oral agreement that the maker of the note was not to pay it unless he received the amount of the note from another person.

If the drawee who has written his name on the back of a draft, on its presentation to him as acceptor for payment, asks for time, and by agreement with the holder gives his promissory note payable at a future day for the amount of the draft, the note is founded on a good consideration whether or not the maker previously was bound as acceptor of the draft.

CONTRACT on a promissory note for $250. Writ dated March 8, 1902.

In the Superior Court the case was tried before *Hardy*, J., without a jury. The judge found for the plaintiff; and the defendant alleged exceptions.

The draft upon the defendant, described in the opinion, was as follows: "$250.00. August 14, 1901. Mr. Wm. Tebo. Will please pay to R. J. Torpey or order two hundred and fifty dollars and charge to my account. Due Oct. 1. John Ryan."

The defendant wrote his name on the back of this instrument.

M. M. Taylor, for the defendant.

A. M. Taft & J. B. Scott, for the plaintiff.

LORING, J. This is an action on a negotiable promissory note for $250, payable to the plaintiff, dated October 31, 1901.

It appeared that the note sued on was given in payment or renewal of a prior note of like tenor, dated October 1, 1901, payable thirty days after date, and that that note was given in payment or renewal of the liability of the defendant by reason of his liability on a bill of exchange drawn on him by one Ryan. It also appeared that Ryan drew the bill of exchange in payment of groceries bought by him of the plaintiff, and that Ryan

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was a subcontractor under the defendant, who was building a house for one Horan and money was coming to him as such subcontractor from Tebo. The defendant Tebo offered to show that his acceptance and both notes were given on the oral understanding that he was not to pay the $250 unless he received that amount from Horan, and that Horan never had paid him anything.

The defendant's argument is that the instrument drawn by Ryan on Tebo was an order and not a bill of exchange; that an acceptance of an order by the drawee's writing his name on it is not a written contract and for that reason that he could show what the true agreement made by word of mouth was and that no liability under it ever came into existence; and finally, that under these circumstances both notes were without consideration.

But the instrument drawn by Ryan on Tebo was a bill of exchange. The defendant has not stated why he assumes that this is an order and not a bill of exchange. We suppose it is because of the words "due Oct. 1." But we think that those words mean that the $250 in question is to be due October 1, that is to say, is to be paid October 1. So construed, the order was an unconditional order to pay a sum certain in money, at a fixed future time, to the payee or order. That instrument is a bill of exchange. R. L. c. 73, § 18.

It is not necessary to consider whether by writing his name on the back of the draft the defendant accepted it (as to which see *Young* v. *Glover*, 3 Jur. (N. S.) 637). If it be assumed that it was not accepted, the note of October 1 given by the drawee in payment of the draft when the draft was presented for payment at maturity was a written contract and evidence to contradict its terms was not admissible. *Tower* v. *Richardson*, 6 Allen, 351. *Wooley* v. *Cobb*, 165 Mass. 503.

On presentment of the draft for payment the plaintiff was entitled to have it honored or dishonored. If dishonored, he had a right of action against the drawer on giving him due notice of its dishonor. The defendant did not refuse payment, but offered to pay on time being given him, to which the plaintiff acceded, and this promise was put into the form of a promissory note. That note was founded on a valid consideration.

Exceptions overruled.

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EUGENE A. FELCH *vs.* INHABITANTS OF WEST BROOKFIELD.

Worcester. September 30, 1903. — October 21, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Way, Defect in highway.

A town is not liable for an injury caused by an unsuitable bridge, outside of the travelled path of a highway, constructed across a gutter to connect a private way with the highway.

TORT for personal injuries alleged to have been caused by a defect in a highway leading from the centre of the village of West Brookfield to the town of Warren. Writ as amended dated June 27, 1902.

At the trial in the Superior Court before *Hardy*, J., it appeared, that the alleged defect consisted in a plank bridge across a gutter which the plaintiff contended was too narrow, unsuitable, and improperly guarded. The accident happened when the plaintiff was attempting to drive over this bridge in a snow storm on January 7, 1902, at about six o'clock P. M. The bridge had been constructed across the gutter to connect a private driveway with the highway and was outside of the travelled portion of the street.

At the close of the evidence, the defendant having requested a ruling that upon all the evidence the plaintiff could not recover, the judge asked the plaintiff's counsel whether he contended that the way reached by the bridge was a public highway, and he replied that he did not. The judge ordered a verdict for the defendant, on the ground that the accident was without the limits of the highway, so far as it was wrought for public travel, and that the plaintiff was not a traveller upon the highway at the time of the accident. The defendant alleged exceptions.

H. W. King & C. M. Rice, for the defendant.

J. R. Kane, for the plaintiff.

BARKER, J. It being plain that the plank bridge off one end of which the plaintiff's wheel fell, causing the injury, was not a part of the travelled path but outside of it, and constructed solely

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for the purpose of facilitating access between the travelled path and a private way which opened into the highway on one side, and from which the plaintiff was driving, the case is governed by that of *Kellogg* v. *Northampton*, 4 Gray, 65, 69. See also *Howard* v. *North Bridgewater*, 16 Pick. 189; *Shepardson* v. *Colerain*, 13 Met. 55; *Smith* v. *Wendell*, 7 Cush. 498; *Harwood* v. *Oakham*, 152 Mass. 421; *Carey* v. *Hubbardston*, 172 Mass. 106; *Kelley* v. *Boston*, 180 Mass. 233.

Exceptions overruled.

LAWRENCE F. KILTY *vs.* RAILROAD COMMISSIONERS.

Worcester. September 30, 1903. — October 21, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Prohibition. Street Railway. Railroad Commissioners.

Assuming that in this Commonwealth a writ of prohibition sometimes may be granted on the petition of a stranger, the granting of the writ in such a case is not a matter of right but of discretion.

In view of the provision in R. L. c. 112, § 100, which gives to any interested party a remedy in equity in case of any erroneous ruling of any State board or commission relative to street railways, this court will refuse in any ordinary case to issue a writ of prohibition to correct an error of the railroad commissioners in regard to a street railway company.

Whether the decision of the railroad commissioners as to the performance of the requirements preliminary to the establishment of a street railway corporation, under R. L. c. 112, § 13, c. 111, § 46, is final, or is subject to revision by this court on questions of law, was left open in this case.

KNOWLTON, C. J. This is a petition for a writ of prohibition to restrain the railroad commissioners from issuing a certificate of compliance to the Hartford and Worcester Street Railway Company under the provisions of R. L. c. 112, § 13, and c. 111, § 46. The presiding justice refused the writ as a matter of discretion, and also made certain rulings to which the petitioner excepted. The case comes before us on these exceptions.

The ground on which the petition rests is that, because of the refusal of the selectmen of Oxford to grant a location to the street railway company in that town, the railroad commissioners

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could not legally issue a certificate of compliance with the requirements of the law, preliminary to the establishment of a corporation. Oxford is one of the towns mentioned in the agreement of association, through which the route was to run. The petitioner is a stranger to the proceedings, having no other interest in the matter than that of an inhabitant of the town of Oxford.

If we assume, in accordance with the law in England and in some of the American States, that a writ of prohibition may sometimes be granted upon the petition of a stranger (see *Attorney-General* v. *Boston*, 123 Mass. 460, 479; *Smith* v. *Whitney*, 116 U. S. 167, 173) we hold that the granting of a writ in such a case is not a matter of right, but a matter of discretion. This is the rule established by recent decisions in England, and generally approved where the subject has been considered elsewhere. *The Queen* v. *Local Government Board*, 10 Q. B. D. 309. *Mayor & Aldermen of London* v. *Cox*, L. R. 2 H. L. 239. *Smith* v. *Whitney*, 116 U. S. 167, 173. *In re Rice*, 155 U. S. 396, 402, 403. *In re Huguley Manuf. Co.* 184 U. S. 297, 301. High, Ex. Leg. Rem. § 606, and cases cited. Inasmuch as the writ in this case was refused in the exercise of the judge's discretion, as well as upon other grounds, this alone requires us to overrule the exceptions.

Another thing which brings us to the same result is the provision in the R. L. c. 112, § 100, which gives to any interested party a right to a remedy in equity, in case of an erroneous ruling of any State board or commission relative to street railways. It is a general rule that a court of law will not issue a writ of prohibition to an inferior court where there is a right of appeal or a remedy in equity which will give full and adequate relief from the anticipated error. *Jaquith* v. *Fuller*, 167 Mass. 123, 128. *Fairweather* v. *McKim*, 168 Mass. 103. 23 Am. & Eng. Encyc. of Law, (2d ed.) 207, and cases cited in note. We are of opinion that under this provision of the statute the court should refuse to exercise this extraordinary jurisdiction to correct an error of the railroad commissioners in any ordinary case.

It is unnecessary to determine whether the decision of the railroad commissioners under the R. L. c. 111, § 46, upon the

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question whether the preliminary requirements of the chapter have been complied with is final, or is subject to revision by this court on questions of law; nor is there any occasion to consider the fundamental question which was decided by the railroad commissioners.

Exceptions overruled.

A. P. Rugg, for the petitioner.

F. H. Nash, Assistant Attorney General, for the respondents.

ESTELLA CLEMENT *vs.* BOSTON AND MAINE RAILROAD.

Hampshire. September 15, 1903. — October 22, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Negligence, On railroad.

Whether a woman passenger, fifty-two years of age, with a jug of molasses in her left hand and a satchel suspended from her right arm is in the exercise of due care when falling or being thrown from a train which has stopped at a station and is started again as the passenger is on the steps of the car taking hold of the outer iron rail with her right hand in the act of alighting, is a question of fact for the jury.

Whether a fireman on a passenger train, whose duty it is to receive from the conductor a signal to start the train and to convey the order to the engineer, is negligent in thinking that he sees such a signal given by the conductor, when it is not, and instructing the engineer to start the train, is a question of fact for the jury.

TORT, for personal injuries, for being thrown from a car on a train of the defendant from which the plaintiff was alighting. Writ dated November 15, 1900.

At the trial in the Superior Court before *Maynard*, J., it appeared that the accident happened at about 6.30 P. M. on October 13, 1900; that the plaintiff, a woman fifty-two years of age, was a passenger on a train of the defendant from Northampton to Pansy Station, a flag station in Belchertown; that the train had stopped at that station, which was on the left of the train, and, while the plaintiff was descending the steps of the car with a two quart jug of molasses in her left hand and a satchel hanging on her right arm by a chain, taking hold of the

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outer iron rail with her right hand, the train started without any order or direction from the conductor, and the plaintiff fell or was thrown from the car and injured; that the conductor alone had the right to order the train started, that one Hickson was the fireman, and that at stations on the left of the train it was his duty to receive the signal to start from the conductor and convey the order to the engineer, that the signal was a high and forward motion of the lantern, that Hickson, seeing something at the place where the conductor usually was, which he mistook for this signal from the conductor, said "All right" to the engineer, who immediately started the train, and the accident occurred.

There was evidence that the plaintiff in 1896, in 1897, and in 1899 had been ill with nervous trouble and hysteria, and the defendant contended that her physical condition, attributed by her to the accident, was due to a recurrence of the hysteria to which she was subject.

At the close of the evidence the defendant requested the following rulings: "1. On all the evidence the plaintiff is not entitled to recover. 2. There is no evidence of actionable negligence of the defendant. 3. If the train started after a stop of about the usual time to transact the business at that place and after several passengers had alighted and some baggage had been removed from the train, and because the usual signal of swinging a lantern was given on the platform as the conductor was accustomed to give it and at or near the place where he was accustomed to give it, that starting did not amount to actionable negligence. 4. If the train on which the plaintiff was a passenger started while she was on the steps of the car alighting, after a stop of about the usual time to transact the business at that place, and after several passengers alighted and some baggage had been removed from the train, and because the usual signal for starting, consisting of swinging a lantern, was given on the platform, it being dark, as the conductor was accustomed to give the signal to start and at or near the place where he was accustomed to give it, and was not given by the conductor or with his knowledge or by any one having authority to give it, or in the employ of the defendant, but by a stranger, of his own accord, and while the conductor was assisting the plaintiff from the train, and which

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the fireman, who was on the lookout for the signal to start, took to be the signal of the conductor, and so communicated it to the engineer, who started the train, if the fireman had no reason to believe it to be other than the signal of the conductor, the starting of the train under the circumstances would not amount to actionable negligence."

The judge refused to give the first and second rulings requested, and on the subject of the third and fourth requests gave instructions which included the following: "Then the question comes, was this fireman negligent, in giving the order to the engineer to start the train? Well, if he gave the engineer the order to start the train, I mean the proper instruction to the engineer to start the train, and he was negligent about getting the signal, negligent in giving it to him or about determining whether it was from a proper signal, that would be negligence for which the defendant railroad would be responsible. But if, on the other hand, you should find that the fireman was deceived, was led to give the instruction to start the train and was deceived in such a way that you would say that any reasonable man acting under the circumstances would be deceived, so that you can say that his act in giving the signal, giving the instruction to the engineer, was what you would expect of a man acting reasonably in his position under the circumstances, and that he was reasonably led to the mistake and was not careless in acting on that information, then the railroad company would not be liable for it."

The jury returned a verdict for the plaintiff in the sum of $5,000; and the defendant alleged exceptions.

W. G. Bassett, for the defendant.

J. B. O'Donnell, (*J. C. Hammond* with him,) for the plaintiff.

HAMMOND, J. It would serve no useful purpose to rehearse in detail the evidence in this case. It is plain that the questions whether the plaintiff was careful, the defendant careless and any injury suffered by the plaintiff was attributable to this carelessness were questions of fact for the jury, and we cannot say that the verdict in favor of the plaintiff was not warranted. The first two requests were therefore rightly refused.

The instructions to the jury upon the subject matter embraced in the third and fourth requests were clear, full and sufficiently favorable to the defendant.

Exceptions overruled.

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CELINA PROVOST *vs.* W. F. COOK & another.

Hampden. September 22, 1903. — October 22, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Sale. Negligence.

One who sells oats damaged by a fire at a reduced price, knowing that the purchaser is buying the oats to feed his horses, and knowing that there was paris green in broken packages in parts of the room in which the oats were at the time of the fire, and that by reason of the fire and the water used in extinguishing it the oats might have become impregnated with the poison, is liable for the loss of the purchaser's horses killed by eating the oats.

TORT, alleging that the defendants sold to the plaintiff a quantity of oats to be fed to her horses, as oats fit for such use, and that the oats were not wholesome or fit for use, but were unwholesome and poisonous, and were covered and saturated with paris green, a poisonous substance, all of which the defendants well knew and had good reason to know; and that the plaintiff, believing said oats to be wholesome and fit for use, fed the same to her horses, and her horses thereby were poisoned and died, whereby, and by reason of the false and negligent conduct of the defendants in making the sale, the plaintiff was put to great expense in attempting the cure of her horses, and they became of no value to the plaintiff. Writ dated January 8, 1901.

The answer of the defendants contained a general denial, and further averred that the oats had been bought by the plaintiff as damaged oats, at a reduced price, and that therefore the defendants were not liable.

At the trial in the Superior Court *Mason*, C. J. ordered a verdict for the defendants; and the plaintiff alleged exceptions.

W. R. Heady, for the plaintiff.

S. S. Taft, for the defendants.

HAMMOND, J. While the evidence was conflicting and a verdict for the defendants might reasonably have been expected, still we think that it would have warranted a finding that paris green was kept at times by the defendants upon the shelf upon the east wall of the room in which the oats were kept, and

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sometimes packages of it more or less broken were allowed to be in other parts of the room; that it was so kept and scattered about the room at the time of the fire, and that by reason of the fire, the water used in extinguishing it and the attendant confusion, the oats in the room, of which those sold to the plaintiff were a part, were exposed to this poison and to a liability to be impregnated with it to such an extent as to be poisonous as food for animals, and that all this was known to the defendants. There was evidence tending to show also that the buyer bought the oats to be fed to her horses and cattle, that this was known to the defendants, that the oats were poisonous, and that the horses died from the effects of the poison.

If such were the facts, then the case is within the rules laid down in *French* v. *Vining*, 102 Mass. 132, and the plaintiff is entitled to recover, unless a distinction is to be made between the two cases upon the ground that here the oats were known to be somewhat damaged and were bought as such. It is strongly insisted by the defendants that the rule of *French* v. *Vining* is not applicable to the case where the goods sold are known to be damaged. But in this case the damage which the parties had in contemplation was that which arose from dampness and other similar causes, and it cannot be assumed that either party supposed that the difference in price was due to the existence of a deadly poison in the oats. Although the oats were in some respects unsound, still it was in the contemplation of the parties that they should be fed to the buyer's animals, and under such circumstances the reason for the application of the rule is as strong as in the case of oats sound in all other respects.

Exceptions sustained.

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LIZZIE EDWARDS *vs.* ORRIN SLATE.

Hampden. September 23, 1903. — October 22, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Contract, Performance and breach.

One who, in consideration of the agreement of a woman to serve him as housekeeper during his life, agrees that if she does so he will leave her $500 by his will, and thereafter wrongfully discharges her, depriving her of her board and lodging as housekeeper and the right to earn her legacy, commits a breach of his contract, which gives a present right of action to the person discharged.

CONTRACT, for alleged breach of an agreement in writing. Writ dated September 5, 1902.

At the trial in the Superior Court before *Gaskill*, J., it appeared that the contract sued upon was as follows:

"Memorandum of agreement made this seventh day of December, in the year one thousand nine hundred and one, by and between Orrin Slate, of Belchertown, in the County of Hampshire, and Lizzie Edwards, of Springfield, in the County of Hampden, both in the Commonwealth of Massachusetts. The said Lizzie Edwards agrees to become housekeeper for said Slate, for a term commencing at the date hereof, and to continue during the natural life of said Slate, and as such housekeeper, to render him faithful and efficient services in that capacity during said term. And in consideration thereof, the said Orrin Slate agrees that if the said Lizzie Edwards shall so remain with him, as aforesaid, during his natural life, under the terms of this contract, he will by his last will and testament, leave to her the sum of five hundred dollars, to be paid from his estate, by his executor named in said will, or such person as may administer his said estate. Witness our hands and seals, the day and year first above written. Orrin Slate, [Seal.] Mrs. H. E. Edwards, [Seal.]"

In November, 1901, the plaintiff was hired by the defendant to work for him as housekeeper upon the verbal agreement that she should remain in his employ during his life, and should receive from the defendant as wages the sum of $2 per week, and the further sum of $500 at his death. After the plaintiff

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had begun to work for the defendant under this verbal agreement, she requested the defendant to deposit the sum of $500 in a savings bank for her, but the defendant refused to do so, and procured an attorney to draw the contract declared on, which was signed in duplicate by both the plaintiff and the defendant, and one copy was held by each.

The plaintiff remained in the employ of the defendant until about the last of August, 1902, when she testified that the defendant ordered her to leave and discharged her. The defendant denied that he discharged the plaintiff, and contended that she left his employment voluntarily, and that there was cause for a discharge.

Before the execution of the contract declared on, the plaintiff received, at various intervals, sums of money in payment of the weekly wages of $2, due to her under the verbal agreement, and received similar payments on the same account after the making of the written contract. The sums so received by her were sufficient to pay her at that rate for all the time during which she actually worked for the defendant. There was no evidence that the defendant had not provided for leaving $500 to the plaintiff in his will.

The defendant contended, among other things, that the action was prematurely brought.

The judge submitted to the jury the following question, as the only disputed question of fact: "Did the defendant unjustifiably discharge the plaintiff?" The jury answered "Yes." The judge thereupon directed the jury to return a verdict for the defendant, and reported the case for determination by this court. If the plaintiff was entitled to recover upon the finding of the jury, the verdict was to be set aside and judgment entered for the plaintiff for the sum of $325, damages, agreed upon by the parties, and interest from the date of the writ; otherwise, the verdict was to stand.

J. B. Carroll & W. H. McClintock, for the plaintiff.

C. L. Gardner, C. G. Gardner & E. S. Gardner, for the defendant.

HAMMOND, J. The defendant contends that the only obligation imposed upon him by this contract was to leave to the plaintiff by his last will a legacy of $500, and that an action

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for breach of that obligation cannot be maintained during his lifetime.

But this is a very incomplete view of the defendant's duties under the contract. At the time of its execution the plaintiff was and for some months prior thereto had been in the employ of the defendant as his housekeeper, at a salary of $2 a week. Under the circumstances disclosed in this case the term "housekeeper" implies that she received also her lodging and her board, and the fair construction of the contract is that, in this respect at least, there was to be no change. It was implied upon the part of the defendant that the plaintiff should be permitted to work in his house and have her board and lodging free of expense to her so long as there was no default on her part. The jury have found that she was unjustifiably discharged. This was a breach of the contract on the part of the defendant. It deprived the plaintiff of her board and lodging, and of her right to earn her legacy.

The declaration shows that the present action was not brought for breach of the promise to leave the legacy, but for unjustifiably discharging the plaintiff and thus depriving her of her rights under the contract. For this breach of the implied duties imposed upon the defendant, duties to be performed in his lifetime but which he unjustifiably refuses to perform, an action will lie during his life. It is a simple case of a breach of contract, and the general rule applies that the action may be brought as soon as the breach occurs. See *Parker* v. *Russell*, 133 Mass. 74; *Paige* v. *Barrett*, 151 Mass. 67.

The defendant relies upon *Daniels* v. *Newton*, 114 Mass. 530, and also upon cases like *Patterson* v. *Patterson*, 13 Johns. 379, where actions have been brought during the lifetime of the promisor upon an alleged breach of an agreement to make a bequest; but the principle upon which those cases were decided has no application to a case like this.

The action was not prematurely brought and, there being no question raised as to the rule of damages, it follows that by the terms of the report the verdict should be set aside and judgment entered for the plaintiff for the sum of $325 damages, with interest from the date of the writ; and it is

So ordered.

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COMMONWEALTH *vs.* WILLIAM H. KELLEY.

Worcester. September 29, 1903. — October 22, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Pleading, Criminal. Constitutional Law.

A count under R. L. c. 218, § 38, charging that the defendant "did steal" a sum of money named of the property of the estate of a certain person, deceased, sufficiently charges the defendant with the crime of embezzlement of money held by him as administrator as described by Pub. Sts. c. 203, § 46, (R. L. c. 208, § 48.)

The provision of St. 1899, c. 409, § 12, (R. L. c. 218, § 38,) making a charge of "stealing" in an indictment good as a charge of embezzlement, is not unconstitutional as applied to offences committed before the enactment of the statute.

INDICTMENT, with nine counts, found and returned January 20, 1902.

At the trial in the Superior Court before *Pierce*, J., the first four counts were nol prossed on motion of the district attorney. On the sixth, seventh, eighth and ninth counts the jury found the defendant not guilty. The defendant made the requests for rulings stated in the opinion, which were refused by the judge. The jury returned a verdict of guilty on the fifth count. The defendant moved to set aside the verdict, on the grounds that it was against the evidence, against the weight of the evidence, and against the law and the evidence, and also because there was a variance between the allegations on which the defendant was tried and the proof. After sentence the defendant made a further motion to set aside the verdict and the sentence, on the ground that the defendant was sentenced under R. L. c. 208, § 48, and that the fifth count, on which the defendant was found guilty, contained no allegation that the defendant was trustee or administrator or embezzled the property, but charged simple larceny only. The judge denied both motions. The defendant alleged exceptions, raising the questions stated by the court.

The fifth count was as follows: "And the jurors aforesaid on their oath aforesaid do further present that the said William H. Kelley on the eighteenth day of May in the year of our Lord one thousand eight hundred and ninety seven, at Warren in the

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County of Worcester aforesaid, did steal one thousand dollars in money of the value of one thousand dollars, of the property of the estate of John W. Downey, late of said Warren, deceased."

F. B. Hall, for the defendant.

R. Hoar, District Attorney, & *G. S. Taft*, Assistant District Attorney, for the Commonwealth.

HAMMOND, J. The defendant argues that the evidence was insufficient to convict him of larceny or embezzlement in any form. We are of opinion, however, that it was sufficient to warrant a finding that he had committed the offence described in Pub. Sts. c. 203, § 46, by embezzling while administrator of the Downey estate the whole or a part of the $125, property of the estate, drawn from the Ware Savings Bank in July, 1897. Within the first six months of his appointment as administrator, he drew out from that bank and another savings bank sums aggregating in the whole $1,280, belonging to the estate. In all he drew out $1,684. The total amount remaining in the two banks, together with all he redeposited, amounted to only $128.47, which is all the succeeding administrator received. He paid out for the estate and retained for his services, according to his own account, $994.49, and, as allowed by the Probate Court, only $678.83. Before he withdrew the $125 on July 1, 1897, he already had drawn from the two banks $900. In order to bring his charges and expenses to the sum of $994.49, he asked to be allowed for his services as administrator $175, of which the court allowed only $75. The defendant testified in his own behalf as to what he had done with the money, and as to outstanding obligations still existing for contracts made by him while administrator, but, without reference to interest, it did not appear that he had in his hands property amounting to the balance found by the Probate Court against him, and the jury in view of all the circumstances may not have believed fully his statements. They may have concluded upon the evidence that there was no need of drawing out the $125 above named for the payment of claims against the estate, and that it was subsequently fraudulently used by the defendant for his own purpose, and that such use was made of it in the town where the defendant resided, which was in Worcester County. We are of opinion that the evidence justified such a conclusion.

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It is further argued by the defendant that, even if the evidence did show that he committed a crime, it was embezzlement and not larceny, that these two offences are different in law, and that since the count upon which he was convicted alleges larceny it is not supported by proof of embezzlement. It appears that at the trial the defendant urged this distinction, and requested the judge to rule that the evidence did not show him guilty of larceny, and to direct a verdict of acquittal. This the judge refused to do. He further requested the judge to rule that the statute which provides that "whoever embezzles, or fraudulently converts to his own use, money, . . . shall be deemed guilty of simple larceny," (Pub. Sts. c. 203, § 37,) does not merge the two offences or make the embezzlement larceny. The judge refused to make this ruling, "not because it was not true as a bare proposition of law but because it was not called for upon the facts disclosed."

The count evidently was drawn under R. L. c. 218, § 38, and it complies with the form set forth at the end of that chapter, under the title "larceny"; and the question is whether it covers the crime of embezzlement. The provisions of this chapter so far as material to this question first appear in St. 1899, c. 409, which was passed in accordance with the report and recommendation of the commissioners (see Senate Doc. No. 234 of that year) appointed under c. 85 of the Resolves of 1897, "to investigate and report upon a plan for the simplification of criminal pleadings, and to prepare a schedule of forms of pleadings to be used in criminal cases." Prior to that statute, although one guilty of embezzlement was, in the language of the statutes, "deemed . . . to have committed the crime of simple larceny," or, in the later forms, "deemed guilty of simple larceny," still it was held that that kind of larceny was of a peculiar and distinctive character and that the indictment must contain, in addition to all the requisites of an indictment for larceny at common law, allegations setting forth the fiduciary relation, or the capacity in which the defendant acted. Accordingly it has been held that proof of embezzlement will not sustain an indictment charging merely a larceny, and that proof of larceny will not sustain a charge of embezzlement. *Commonwealth* v. *Simpson*, 9 Met. 138. *Commonwealth* v. *King*, 9 Cush. 284. *Com-*

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monwealth v. *Berry*, 99 Mass. 428. Somewhat akin to these two crimes in many respects is that of obtaining money or goods by false pretences; and an indictment for this offence differs from that of larceny or embezzlement. It was felt by the commissioners that "the over-refined and illogical distinctions" between these three crimes "have led to scandalous abuses of justice by acquittals," and, "to obviate the possibility of miscarriage of justice on this account," they proposed "a single form of indictment for the three crimes, containing simply an allegation that defendant 'stole' certain goods." See 1899, Senate Doc. No. 234, pp. 16, 17. The St. of 1899, following the recommendation of the commissioners, contains a simple form for larceny, but no separate form for embezzlement or for obtaining money or goods by false pretences. In § 12, under the head of "Meaning of Words," it is provided that "the following words when used in an indictment shall be sufficient to convey the meaning herein attached to them"; and among others are these: "Stealing. — Larceny. — The criminal taking, obtaining, or converting of personal property with intent to defraud or deprive the owner permanently of the use of it; including all forms of larceny, criminal embezzlement, and obtaining by criminal false pretences." The count in question was drawn up under the provisions of this statute as subsequently enacted in R. L. c. 218, § 38. Under this last statute the word "steal" in an indictment becomes a term of art and includes the criminal taking or conversion in either of the three ways above named, and hence the indictment is sustained, so far as respects the criminal nature of the taking or conversion, by proof of any kind of larceny, embezzlement or criminal taking by means of false pretences. If it be objected that this construction makes the indictment so indefinite that the accused is not sufficiently informed of the nature of the charge which he is called upon to meet, the answer is that it is provided in the same statute (§ 39) that "the court may, upon the arraignment of the defendant, or at any later stage of the proceedings, order the prosecution to file a statement of such particulars as may be necessary to give the defendant and the court reasonable knowledge of the nature and grounds of the" accusation, and, if requested by the accused, shall so order in all cases in which the court has final jurisdiction, where the accu-

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sation would not be otherwise fully, plainly, substantially and formally set out. "If there is a material variance between the evidence and the bill of particulars, the court may order the bill of particulars to be amended, and may postpone the trial, which may be before the same or another jury, as the court may order. If, in order to prepare for his defence, the defendant desires information as to the time and place of the alleged crime or as to the means by which it is alleged to have been committed, or more specific information as to the exact nature of the property described as money, or, if indicted for larceny, as to the crime which he is alleged to have committed, he may apply for a bill of particulars as aforesaid." This is a sufficient protection to the accused. Indeed it is manifest that since under the former practice the right to a bill of particulars was a matter that lay within the discretion of the court and therefore could not be claimed as of right, (*Commonwealth* v. *Wood*, 4 Gray, 11,) this statute, which makes the right to such a bill absolute, places the accused in a better position than he was before. Of course the bill of particulars cannot enlarge the scope of the indictment. It cannot specify a charge not covered by the indictment. Its only purpose is to specify more particularly the acts constituting the offence.

In view of these considerations we are of opinion that the count in question must be regarded as including within its "four corners" any criminal act of taking or conversion of money the property of the estate therein named, to the amount of $1,000, committed by the defendant within the jurisdiction of the court, and within the statute of limitations, whether the offence be larceny, embezzlement, or obtaining by criminal false pretences; and consequently that it covered the crime of embezzlement as described in Pub. Sts. c. 203, § 46, of which under instructions not objected to, except as above stated, the jury convicted the defendant.

It is further urged by the defendant that, inasmuch as the offence of which he was convicted was committed prior to the statute, it is as to that offence an *ex post facto* law, and for that reason unconstitutional as applied to his case. But this position is untenable. The statute neither creates a new crime nor in any way changes one existing at the time it took effect; nor

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does it increase or in any way affect the punishment for any crime. It does not establish any new presumption of fact or of law against the accused, nor in any other way alter any rule of evidence or the nature of the evidence required to convict. The defendant was tried for the same crime, under the same presumptions as to his guilt or innocence and under the same rules of evidence as he would have been tried before the statute. It relates purely to the matter of technical pleading as to the words to be used in setting forth a criminal act, and even in this respect is favorable to the accused in that the right to a bill of particulars, which theretofore was within the discretion of the court, has become absolute. In no respect is the situation of the accused changed to his disadvantage. No citation of authorities is needed to show that the statute as thus interpreted is not an *ex post facto* law within the meaning of either the Federal or State constitutions. The defendant was not prejudiced by the action of the court at the trial in dealing with his requests.

As the defendant was acquitted upon the ninth count, the rulings as to the competency of the evidence admitted as bearing solely upon that count become immaterial.

As to the first motion to set aside the verdict, it may be said that so far as it raises any question of law it raises none which could not have been raised at the trial, and so far as it was an application for a new trial upon other grounds, the matter was within the discretion of the judge. And notwithstanding the remarks made by the judge, it does not appear that the motion was not overruled in the exercise of his discretion.

The second motion that the verdict of the jury and the sentence be "set aside" so far as it respects the verdict, raises no question which could not have been raised at the trial, and, so far as it respects the sentence, does not show that the defendant was not sentenced for the crime with which he was charged and upon which he was convicted. Pub. Sts. c. 203; c. 215, §§ 3, 8. R. L. c. 220, §§ 5, 10.

Exceptions overruled.

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COMMONWEALTH *vs.* FELIX ANTAYA.

Worcester. September 29, 1903. — October 22, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Evidence, Admissions and confessions.

Whether a confession was voluntary is primarily a question for the presiding judge, who, if he admits the evidence, must submit the question finally to the jury.

In a trial for larceny the judge admitted a confession made by the defendant at a police station. Subsequently it appeared that after a part of the conversation in which the confession was made had taken place, a police officer present told the defendant that "it would be better for him and all concerned to tell the truth." The government witnesses testified that this remark was after the confession. The defendant testified that it was before parts of the confession had been made. The defendant asked to have the whole confession excluded. The judge instructed the jury not to consider any of the conversation which they found to be subsequent to the officer's remark. In this court the defendant contended, that it was the duty of the judge to pass upon the confession as a whole, and not to leave the question of the dividing line to the jury. *Held*, that, even if this point, which seemed not to have been taken at the trial, was open to the defendant, the fair inference was that on the preliminary question of admission the judge had found that the whole confession was made before the officer's remark, and that the submission of the question finally to the jury was in accordance with the established practice.

It is no ground for excluding a confession that immaterial parts of the conversation in which the confession occurred may have been omitted from the evidence.

INDICTMENT for larceny returned May 15, 1902.

The defendant was tried in the Superior Court before *Hardy*, J. At the close of the evidence the defendant requested the judge to make the following rulings, which are referred to in the opinion: "First. That the statements of the defendant at the police station cannot be considered by the jury as evidence against the defendant. Second. If the jury find that a full statement of what was said by the defendant and the others present at the interview, at the police station, has not been given in evidence, and that some of the statements have been omitted, then the statements of the defendant cannot be considered." The judge refused to rule as requested.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

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C. C. Milton, *H. H. Thayer* & *J. P. Morrissey*, for the defendant.

R. Hoar, District Attorney, & *G. S. Taft*, Assistant District Attorney, for the Commonwealth.

HAMMOND, J. When a confession is offered in evidence, the question whether it is voluntary is to be decided primarily by the presiding judge. If he is satisfied that it is voluntary it is admitted, otherwise it is rejected. But even if it is admitted, the jury may disregard it if they are not satisfied that it is voluntary. *Commonwealth* v. *Preece*, 140 Mass. 276. *Commonwealth* v. *Bond*, 170 Mass. 41. *Commonwealth* v. *Reagan*, 175 Mass. 335, and cases cited.

In putting in its case the government introduced two witnesses who, against the objection of the defendant, were allowed to testify to certain statements made by him in the nature of a confession. It is to be assumed that at the time this evidence was offered the presiding judge, upon the case as it then stood, was of opinion that the confession was voluntary. It was therefore properly admitted at that stage of the case, unless as matter of law the judge was not justified in coming to that conclusion. *Commonwealth* v. *Bond*, 170 Mass. 41, 43. Without here reciting the evidence in detail, it is sufficient to say that it amply warrants the conclusion. The first request therefore was properly refused.

It subsequently appeared that one Shea, a police officer, "took part, after a while, in the conversation with" the defendant, and told him "it would be better for him and all concerned to tell the truth." The government witnesses testified that Shea did not say this to the defendant until the latter had made the whole confession testified to by them. The defendant testified that Shea's statement was made earlier in the conversation, and before parts of the confession put in by the government had been made. Upon this the jury were instructed not to consider any of the conversation which they found to be subsequent to the statement of Shea.

It is now argued by the defendant that it was the duty of the judge either to pass upon the confession as a whole, or to designate what part was made before Shea's statement and to admit only that part; and that the action of the judge in leaving to

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the jury the question of the dividing line was wrong. It is, to say the least, doubtful whether this point is open to the defendant upon this record. He was trying to have the whole confession excluded, and the instruction to the jury to disregard the portion made after Shea's statement was to that extent favorable to him. The judge was not asked to find the dividing line, and the defendant does not appear to have excepted to this method of leaving the question to the jury except so far as it was inconsistent with the request that the whole be excluded. But if the point be open, the obvious answer is that even if it was the duty of the judge to pass upon the question as a whole, there is nothing in the record to show that he did not do it. Indeed the fair inference from the record is that so far as respected the preliminary question of admission he was of opinion that the whole confession was made prior to Shea's statement. Since however the jury had the right to pass finally upon that question, the matter was left to them, and they were instructed to act as they should find the facts to be. This was in accordance with the well established practice. *Commonwealth* v. *Cuffee*, 108 Mass. 285. See also cases cited in *Commonwealth* v. *Reagan*, 175 Mass. 335.

The second request would have required the jury to reject the confession even if any part of the conversation in no way material to the questions involved had been omitted from the evidence. It was therefore rightly refused.

Exceptions overruled.

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184 328
192 530

CENTRAL NATIONAL BANK *vs.* ELIZABETH I. COPP.

Worcester. September 29, 1903. — October 22, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Bills and Notes.

One ratifying a signature on a promissory note purporting to be his and which he knows to be forged is bound by it.

A married woman, to shield her husband, ratified a signature on a promissory note to a bank, purporting to be hers but forged by her husband. At maturity the note was surrendered to the husband on his giving in renewal a note similarly

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forged which was accepted in good faith by the bank. In an action by the bank on the first note, it was *held*, that the substitution and acceptance of the second forged note did not constitute a payment, so as to bar an action on the note ratified by the defendant.

CONTRACT on certain promissory notes. Writ dated April 10, 1902.

In the Superior Court the case was tried before *Fox*, J., without a jury. He found for the plaintiff in the sum of $5,390.65; and the defendant alleged exceptions.

A. P. Rugg, for the defendant.

R. Hoar, for the plaintiff, was not called upon.

HAMMOND, J. The judge found that the name of the defendant on the notes declared on is forged, but that in January, 1899, she called at the bank and acknowledged in some form of words that the three notes then held by the bank "were her notes"; and he found for the plaintiff upon the ground of ratification. The defendant has argued that the finding of ratification is not warranted by the evidence, but we think otherwise. The president testified that after some conversation with the defendant as to "a line of discount on notes" signed by her and her husband jointly, in which he cautioned her as to the practice of signing notes for her husband, he took the three notes then held by the bank and handed them to the defendant and said: "These three notes amount to $6,600; are these all right?" and that she said, "Yes, they are all right." It is true that the defendant in her testimony denied that she said the notes were all right, and testified that the president said to her, "This is your signature, is n't it?" and that she replied, "That is my name." She further testified that the thought of forgery came to her mind, and she stopped. It might perhaps be argued that under the circumstances ratification could fairly be found upon the defendant's own testimony, but, whether that is so or not, there can be no doubt that, if the president's version of the interview is correct, the judge was amply justified in finding that with full knowledge of the circumstances she, for the purpose of shielding her husband, ratified the signature. By reason of this ratification she became liable as though her name had been originally placed upon the notes by her authority, even although there was forgery; and the question whether there was a liability by estoppel

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became immaterial. *Greenfield Bank* v. *Crafts*, 4 Allen, 447, 454. *Wellington* v. *Jackson*, 121 Mass. 157.

It is further argued that the three notes have been paid. There is no doubt that the bank went through all the forms usual in cases of payment. Upon maturity the notes were charged against the account kept by the husband in the bank, cancelled by perforation, marked "paid" and, with checks and other things that were properly charged to his account, were handed to him with his bank book whenever it was balanced. The defendant contends that in this way each note was paid as it matured, and that the taking by the bank of subsequent notes for the same respective amounts constituted in each case a new transaction. The judge, however, has found that "when the notes became due, they were surrendered to Copp [the husband] upon the substitution of other similar forged notes," and that "the method of renewal was this, — the notes were charged to Copp's deposit account in the bank and the new notes were at the same time credited to the same account"; and he rules that "the surrender of the notes by the bank upon the substitution of forged notes does not extinguish the bank's right of recovery." The evidence justifies this finding. According to the testimony of the plaintiff's president these notes constituted a "line of discount," and there is nothing to show that either the bank or Copp supposed that any note was paid in any other way than is quite usual in such cases, namely, by the substitution of a new note by the way of renewal. The plaintiff never intended to release the defendant from her obligation on these three notes and to look to the husband alone, and having received the renewal notes upon the faith that they were valid as to the defendant may treat them as a nullity and may recover upon the original notes. *Leonard* v. *Taunton Congregational Society*, 2 Cush. 462. *Almy* v. *Reed*, 10 Cush. 421.

Lastly, the defendant argues that there was such negligence on the part of the plaintiff and its officers as should preclude a recovery; and the fourth and fifth requests relate to that branch of the defence. It is plain, however, from the report that these were among the requests regarded by the judge as inapplicable to the facts found by him. He finds that the plaintiff accepted without question and without suspicion the defendant's state-

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ment as to the validity of her signature to the three notes in question, and that the bank was not informed of the forgery until after the husband's death. It does not appear that the real signature of the defendant was ever known to the officers or that they had any reason to suspect forgery.

It is not argued by the defendant that the thirteenth request is an accurate statement of the law.

In view of the findings of the judge it is unnecessary to go over the requests in greater detail. So far as shown by this record, for reasons above stated, we think that the judge rightly dealt with them.

As to the exclusion of the testimony of the witnesses Chapin and Willis, it is enough to say that it does not appear that the alleged conversations with Marsh the president occurred before the bank ceased to discount the Copp notes.

Exceptions overruled.

JACOB POSNER *vs.* SAMUEL SEDER & another.

Worcester. September 29, 1903. — October 23, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Contract, Implied.

A person employed for one year to be paid a certain sum each week, under a contract which requires him to work overtime without extra pay not more than two hours in one day nor more than two months in the entire year, if wrongfully discharged before the end of the year, cannot sue on a *quantum meruit* for the overtime work alone, although he can sue on such a count for the value of all his services, crediting the amount received as part payment.

One employed under a contract and wrongfully discharged, in suing for the value of his services, need not return the money he already has received. It is sufficient if the amount received is credited upon his claim.

CONTRACT, against manufacturers of clothing, by a foreman and cutter for his services, according to an account annexed. Writ dated April 24, 1901.

At the trial in the Superior Court before *Gaskill*, J., there was evidence that the plaintiff was employed by the defendants under a contract, of which the material provisions are stated in the

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opinion, and that he was discharged by the defendants before the expiration of the term of the contract.

The defendants requested the judge to rule: "1. The contract under which the plaintiff claims to have been working, having a price fixed as compensation for each week and the plaintiff having received such compensation for all the weeks he actually worked, this action brought on an account annexed for the value of services rendered during those weeks, cannot be maintained, even though the defendants refuse to allow the plaintiff to continue in their employ for the remainder of the term covered by said contract." To this request the judge said: "No, there is more to the contract and for that he has not been paid."

The defendants requested the judge to rule: "2. If the plaintiff can recover at all, it must be upon a *quantum meruit*, because the defendants terminated the contract before its completion, but to maintain an action on that ground he must have declared for value of the whole services and have credited amounts received thereon." On this request the judge said "Yes" to the first proposition, and "No" to the second proposition beginning with the word "but."

The defendants requested the judge to rule: "3. The plaintiff cannot recover for services not separable from those which have been paid for." On this request the judge said "Yes, but the extra hours are separable."

The defendants also requested the following rulings: "4. In order to recover on a *quantum meruit* the plaintiff must repay or tender to the defendants all sums received under the contract before bringing the action," and "5. Upon the whole evidence the plaintiff is not entitled to recover under his declaration." Both of these requests were refused by the judge.

The judge found for the plaintiff; and the defendants alleged exceptions.

R. B. Dodge & W. J. Taft, for the defendants.

R. Hoar, for the plaintiff.

HAMMOND, J. Under the contract the defendants were to employ the plaintiff for one year and pay him for his services $17 a week, "the same to be paid at the end of each and every week." The plaintiff was to report at the shop for duty at 6.30 A. M. and remain there on duty until 6 P. M., with the exception

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of the hour between noon and 1 P.M., and was "also, without extra pay, to work overtime at said shop . . . not more than two hours in one day and not more than two months in the aggregate for the year." The defendants broke the contract by the discharge of the plaintiff. In such a case the innocent party may either sue on the contract for damages for the breach, or, if he so elects, he may regard the action of the defendants as indicating a purpose on their part to repudiate the contract, may accept the repudiation and recover upon a *quantum meruit* the value of his services as if the special contract had not existed. *Brown* v. *Woodbury*, 183 Mass. 279. In this case the plaintiff has sued upon a *quantum meruit* for the value of only a part of the services, namely, for those rendered in the extra hours named in the contract.

The plaintiff contends that the $17 which he received each week was payment for only the time between 6.30 A.M. and 6 P.M. and not for the extra time; and that therefore he may upon breach of the contract appropriate the weekly sum to the payment of the services during the regular hours, and recover on *quantum meruit* for the extra time. The defendants on the contrary contend that the $17 was a payment for the services of the week whatever they were, and therefore that the plaintiff has been fully paid and so cannot recover.

Neither view seems to us correct. The contract was to continue a year. The weekly hours of labor were variable, and it is fair to assume that there would be a weekly variation in the value of the services. The contract is to be taken as a whole. On the one hand, the defendants could not hold the plaintiff to the work during the extra hours in any week for the sum of $17 except in connection with the other part of the contract, namely, that they were to pay him $17 in other weeks when there was no extra time; nor on the other hand could the plaintiff hold the defendants to the payment of $17 for a week in which he did not work extra time except in connection with the other part of the contract, namely, that in any week in which he did work extra time he should receive only $17. The true construction of the contract is that it was a hiring for a year, payments to be made by weekly instalments, without reference to the weekly variation in the amount of work done. Since the payments were

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made during the existence of the contract, they cannot be considered as having no reference to the other parts of the contract.

If the plaintiff desires to proceed upon the theory that the contract has been repudiated, his proper course is to proceed upon *quantum meruit* for the value of all his services less what he has received. If he has been paid what they are worth, he can recover nothing; if he has not, he may recover the balance due him. But it is plain that the sum due him is not necessarily the fair price for the extra hours in addition to the sum of $17 per week which he has received. He cannot appropriate the $17 to the payment of the ordinary week's work and sue only for the balance, because, for the reasons above stated, that is not in accordance with the contract under which the payment was made. Upon *quantum meruit* the question is what are his whole services fairly worth, and is there anything due him. Manifestly, under a contract like this, that may be an entirely different sum from the market value of the services during the extra hours. The case of *Clark* v. *Manchester*, 51 N. H. 594, is a good illustration of the principles applicable to a case like this. The second and fifth instructions should have been given in substance.

The other instructions were rightly refused. It is not necessary that the plaintiff before bringing his action should return what he has received. It is necessary only that the amount received should be credited upon his claim. *Brown* v. *Woodbury, ubi supra.*

Exceptions sustained.

184 384
184 1304
184 384
186 1418

M. J. KEEFE *vs.* GEORGE W. FAIRFIELD.

Hampden. September 23, 1903. — October 24, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Contract, Implied, Performance and breach, Damages. *Waiver.*

One who voluntarily has made payments under a contract, and subsequently has broken the contract by failing to make other payments as they became due, cannot recover the money he has paid, if the other party did not break the contract and was ready to perform it.

A provision, in an agreement for the sale of land to be paid for in monthly instalments, that, on the failure for a period of thirty days to pay an instalment, the

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vendor at his election may treat the contract as void and have the right to retain for his own use as liquidated damages all money previously paid under the contract, will be enforced as an agreement for liquidated damages, and not treated as declaring a forfeiture on such failure upon which actual damages should be assessed.

A provision, in a contract for the sale of land to be paid for in instalments, that on a failure to pay an instalment, lasting for a certain period, the vendor at his election may treat the contract as void and retain as liquidated damages the money previously paid under it, is not waived as to future instalments by the vendor accepting payments after defaults have been made.

CONTRACT, with a count for money had and received and another count for an alleged breach of an agreement in writing. Writ in the Police Court of Springfield dated December 7, 1901.

On appeal to the Superior Court the case was tried before *Wait*, J., without a jury. The judge refused to make the rulings requested by the plaintiff, and found for the defendant. The plaintiff alleged exceptions, raising the questions stated by the court.

R. C. Goodale, for the plaintiff.

L. F. Hardy, for the defendant.

KNOWLTON, C. J. This is an action brought to recover money paid by the plaintiff to the defendant under a contract in writing for the purchase of certain building lots from the defendant. The payments were to be made in monthly instalments of $10 each, and the writing contains this language: "Provided, however, that if said party of the second part, his heirs, executors, administrators or assigns, shall fail to pay any of the instalments of said principal sum for the period of thirty days, this agreement shall become null and void and of no effect, at the election of said party of the first part, and said party shall be released from all obligations hereunto, but shall have the right to retain for his own use, as liquidated damages for such failure, all moneys previously paid on account of said principal sum. And no modification of any part of this agreement, or waiver of any of its provisions, shall be binding unless modifications or waiver is noted hereon in writing, signed by said party of the first part." The declaration is in two counts, one for money had and received by the defendant to the plaintiff's use, and one upon the contract, averring that the plaintiff had made payments to the amount of $210, and that he had offered and tendered to the defendant payment of the balance due under the contract, but that the defend-

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ant had notified him that no further payments would be accepted, and that he would not give any deed or deeds under the contract. He also averred generally a readiness on his part and a refusal of the defendant to perform the contract.

The only exception is to the refusal of the judge to give certain rulings requested. The bill of exceptions purports to state all the evidence material to the questions of law. The evidence showed that on August 7, 1899, the plaintiff was adjudicated a bankrupt, and that he was then somewhat in default in making the payments called for by the contract. Between this date and the date of the writ, which was December 7, 1901, he made payments aggregating only $90, which left him much more in default upon the payments which then had become due. The exceptions state that no tender was made by the plaintiff at any time, nor any demand for a deed.

There is nothing in the bill of exceptions to show performance, or an offer of performance of the contract by the plaintiff, and so far as appears the defendant would at any time have received the balance due upon the contract and have given a deed, waiving the plaintiff's delay, if the plaintiff had been ready to pay the balance due. The case stated in the bill of exceptions seems to be merely an attempt of one who has voluntarily made payments under a contract, and who has broken the contract by failing to make other payments as they became due, to recover back what he has paid to the other party to the contract, who has not broken it and who stands ready to perform it. Manifestly there can be no recovery in such a case, and none of the rulings requested could be given in such a case. This alone is enough to dispose of the exceptions.

Most of the requests for rulings seem to have been made upon an assumption that the defendant has exercised his right of election under the provision quoted above, and has treated the contract as void, and has retained the money as liquidated damages. If the facts were in accordance with this assumption, the rulings requested upon the apparent ground that the money cannot be retained as liquidated damages, and that the provision must be treated as declaring a forfeiture upon which actual damages should be assessed, were rightly refused. The doctrine stated in *Guerin* v. *Stacy*, 175 Mass. 595, covers these requests.

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See also *Garst* v. *Harris*, 177 Mass. 72, 74; *Wallis* v. *Smith*, 21 Ch. D. 243; *Atkyns* v. *Kinnier*, 4 Exch. 776, 783.

The other questions in the case it is not necessary to consider at length. In view of the plaintiff's bankruptcy it does not appear that he now has the rights which originally belonged to him under the contract. It is also expressly found that the defendant had no knowledge of his bankruptcy until after the commencement of this suit.

Nor can it truly be said that the defendant, by accepting payments after default in making previous payments, waived the right to insist upon the provisions of the contract when the plaintiff failed to make later payments as they became due.

The waiver did not extend beyond the events that had then occurred, to which it related.

Exceptions overruled.

WILLIAM H. DANIELL *vs.* BOSTON AND MAINE RAILROAD.

184 337
189 133

Hampden. September 22, 1903. — October 30, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Contract, Performance and breach, Damages.

In an action against a railroad company for wrongfully discharging the plaintiff from its employ, it appeared, that the defendant by a contract made in Vermont agreed to employ the plaintiff as station agent at a certain station in Vermont so long as he should perform the duties of the place in a thorough, honest and businesslike manner, and that by the law of Vermont if a superintendent, having authority to do so, allowed a delinquent employee to continue in the employ of the company subject to certain discipline, such action waived the company's right to discharge the employee for any breach of duty that already had occurred. It further appeared, that after the plaintiff had been delinquent in his duty as telegraph operator at the station, the defendant's superintendent wrote to him as follows: "While I should not wish to apply discipline against you on account of it if it was the first case of this kind, must do so in view of the frequent trouble we have with your office in connection with telegraphing and you must if you wish to remain there so conduct the office as to avoid these complaints." The discipline referred to was a system of demerit marks. *Held*, that the defendant elected not to discharge the plaintiff for the breach of duty referred to in the letter of the superintendent, although it did not waive its right

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to take his delinquencies into account in connection with any future breach of duty on his part.

In an action against a railroad company for alleged breach of an agreement to employ the defendant as station agent at a certain station, so long as he should perform the duties of the place in a thorough, honest and businesslike manner, a letter of the plaintiff, relied upon by the defendant to justify his discharge, contained the following: "I am ready to step out for thirty days if you will send a man to relieve me. . . . Will you please send man to commence June 16." *Held*, that, upon the facts appearing in the case, the passage quoted was not a notice of a refusal to act as station master for thirty days after June 16, but was merely a statement that the plaintiff was ready to "step out" in case the defendant would send a man to relieve him for those thirty days, and a request that the thirty days should begin on June 16, and that it did not constitute a repudiation of the contract on the part of the plaintiff or an absolute refusal to perform his obligations under it, which would justify the defendant in discharging him, even if such a notice of intended future action, however construed, would justify an immediate discharge.

An agreement by a railroad company, to employ a person as station agent at a certain station so long as he performs the duties of the place in a thorough, honest and businesslike manner, may entitle the employee thereunder to substantial damages in case of his wrongful discharge.

LORING, J. This is an action for breach of a written contract, dated May 29, 1891, whereby the defendant agreed, in settlement of claims which the plaintiff had against it for personal injuries while in its employ as freight brakeman and freight conductor, to employ him as station agent at its station in Fairlee, Vermont, so long as he should perform the duties of the place in a thorough, honest and businesslike manner. The plaintiff began work as station agent at Fairlee on June 10, 1891, and was discharged on June 16, 1898. The defendant justified the discharge on the ground that he had been guilty of a number of shortcomings extending over nearly the whole of the period of his service. The case was sent to an auditor. It afterwards came on for trial before a jury. The jury were unable to agree, whereupon the judge directed them to find a verdict for the defendant, and the case comes here on an exception to that ruling. In submitting the case to the jury the presiding judge ruled that if the plaintiff was entitled to recover they could give him nominal damages only.

We are of opinion that the judge was wrong in directing a verdict for the defendant.

The contract sued on was made in Vermont and was to be performed in Vermont. The law of Vermont is the law which

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must be looked to in determining what would justify the defendant in discharging the plaintiff. The particular question of law which is material here is how far the defendant corporation waived its right to discharge the plaintiff for a breach of duty by electing not to do so after the breach of duty came to its knowledge. A witness who was duly qualified to testify to the law of Vermont was asked this question: "Supposing the railroad company were informed of the dereliction of duty of the employee, and the railroad company, through its proper officer, having charge of that employee, wrote to that employee, 'we shall have to submit to the general superintendent the question whether a certain process of discipline will be sufficient to meet this case,' and we will suppose, after the matter was submitted to the superintendent, it was decided that a process of discipline would be sufficient, and the employee would be allowed to continue, would you not say that the railroad company had waived its right to discharge the employee for any preceding breach?" To this he replied, "I should say they had, if nothing further occurs, but if something further of the same kind occurs, they would have that additional cause." The auditor found "such to be the law in the State of Vermont."

The auditor's report was put in evidence at the trial, and no evidence was introduced there to contradict or control this finding of fact.

The last breach of duty on the plaintiff's part prior to the letter of June 4, which the defendant relies on in connection with the plaintiff's previous shortcomings as a justification for discharging him, was in connection with the plaintiff's duty as telegraph operator at the station in question. The defendant was under a contract with the Western Union Telegraph Company to furnish a competent and reliable man to do their work, to be paid by the telegraph company.

On May 28, the defendant asked the plaintiff for an explanation of a delay in a message held at White River Junction from 2 P. M. May 26, until 8.05 A. M. of May 27, "on account of that office being unable to raise you." The plaintiff's explanation was that he was away on that day and his man might have plugged the telegraph instrument while talking over the telephone and have forgotten to take it out when he got through speaking on

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the telephone. On June 3, the defendant's superintendent Folsom wrote to the plaintiff acknowledging receipt of his letter of explanation, and after stating the facts wrote: "While I should not wish to apply discipline against you on account of it if it was the first case of this kind, must do so in view of the frequent trouble we have with your office in connection with telegraphing, and you must if you wish to remain there so conduct the office as to avoid these complaints." It was found by the auditor that "in 1897 a system of discipline marks, as it was called, was adopted by the defendant, by which was meant that in case of any failure on the part of an employee to properly perform duties required of him, certain discipline or demerit marks were put down against his name, on a record book kept in the office of the division superintendent."

We are of opinion that the plaintiff is right in his position that the defendant elected not to discharge the plaintiff for the breach of duty in connection with the despatch of May 26, and the question arises whether the letter of June 4 was a breach of duty on the part of the plaintiff which, taken with the previous shortcomings for which the defendant had elected not to discharge him, justified his discharge under the law of Vermont.

The defendant has argued that under the findings of the auditor the question for the jury was whether the letter of June 4, taken in connection with the previous delinquencies for which discipline marks were imposed, justified the defendant in discharging the plaintiff. The finding relied on here is that matters for which discipline marks were applied were not waived. But this and the preceding finding "that until the use of discipline marks, the defendant, by continuing to employ the plaintiff after knowledge of his delinquencies, waived the same," are conclusions of law and are inaccurate, if not wrong. By continuing to employ the plaintiff after knowledge of his delinquencies, whether before or after the use of discipline marks, the defendant elected not to discharge the plaintiff for those shortcomings but, as matters to be taken into account in case of a subsequent breach of duty, they were not waived. By continuing to employ the plaintiff after knowledge of a breach of duty the defendant waived its right to discharge him for that, but it did not waive the breach of duty, and in case of a subsequent shortcoming on the plain-

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tiff's part the defendant had a right to take the plaintiff's whole record into account.

The question therefore arises whether the letter of June 4, alone or in connection with prior shortcomings of the plaintiff, justified the defendant in discharging him; and we are of opinion that it did not.

On June 4 the plaintiff wrote to the defendant this letter:

"Fairlee, Vt. June 4 8. H. E. Folsom, Supt. Lyndonville, Vt. Dear Sir: — I think you ask to much for $30.00. I am ready to step out for 30 days if you will send a man to relieve me. There can no man do the R. R. Co's work & live for $30.00 here. I have tried to explain to you the additional business this station is doing, since I first took it, you agreed to deal with me fairly as to increase of compensation, as business materially increased. You have declined to do this, now I will take the matter up with some one else. You know & I know this station should pay not less than $45.00. Will you please send man to commence June 16. Yours, W. H. Daniell."

To understand this letter and give it its proper construction it becomes necessary to state that there was the following provision in the contract sued on: "in case of an increase or decrease of wages of station agents through the whole Passumpsic Division of said road, the compensation above named shall be subject to the same, and in case the business at said station should materially increase, said Daniell shall be fairly treated as to increase in compensation." There was evidence at the trial that the business at Fairlee had increased forty per cent and that beginning with a letter from the plaintiff to superintendent Folsom, dated December 31, the plaintiff had insisted that he was entitled to have his wages of $30 a month increased to $45 a month. This was refused by Folsom because there had been an increase in the work of other agents on the same division without an increase of pay. Six letters were written back and forth on the subject, between December 31, 1897, and January 27, 1898. Then the matter seems to have been dropped until May 25, 1898, when the plaintiff wrote to Folsom a letter which was not put in evidence but which Folsom answered on June 3, as follows: "I cannot consent to any increase in the way of an additional man at your station before July 1st, but will then consider it." The

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plaintiff also testified that before he received an answer to his letter of June 4 he wrote to Folsom on June 10 as follows: "If you consent to allow me to be absent for 30 days commencing June 16 will you kindly send me pass for Boston & return for myself & wife. I had ought to get quite well rested by that time." Under date of June 9, Folsom wrote that he would relieve the plaintiff of the station on June 16. On receipt of this the plaintiff wrote on June 11 that his request was "only for 30 days that I may get rested. Am nearly sick enough and have been some time, to be confined to the house. Please let me hear from you." To this Folsom answered that "In view of the record of discipline against you, taken with your letter of the 4th inst., I decide to make the change permanent."

The tone of the letter of June 4 is not all that it should be, but it cannot be taken to be so wanting in respect as to be an act of insubordination having the discipline of the railroad in mind, and it seems to us that it is only as such that this letter could be argued to be a breach of duty. It may well be that the plaintiff was sincere in thinking that he was entitled to an increase of pay, and the tone of the letter may be explained although not justified by the fact that the superintendent's refusal to give the plaintiff an additional man and his imposition of discipline marks for the delay of the telegraphic message on May 27 were received by the plaintiff on the same day. The defendant has made no argument on this point and we take up the only arguments which it occurs to us can be put forward in its support.

It is not necessary to consider whether under the rule of *Daniels* v. *Newton*, 114 Mass. 530, and *Ballou* v. *Billings*, 136 Mass. 307, the defendant could have rescinded the contract had the plaintiff's letter of June 4 been a notification of his refusal to work for thirty days after June 16, (which we assume would have been a breach of the contract, *Johnson* v. *Walker*, 155 Mass. 253,) and whether, in case the defendant had a right of rescission, the plaintiff had a right to retract his notice by the subsequent letter of June 9, which he testified was written before Folsom's letter of June 10 was received. In our opinion the letter of June 4 was not such a notification. In the letter of June 4 the plaintiff wrote: "I am ready to step out for 30 days if you will send a man to relieve me," and "Will you please send man to com-

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mence June 16." That is not a notice of refusal to act as station master for thirty days after June 16. It goes no farther than a statement that he is "ready to step out" in case the defendant will send a man to relieve him for those thirty days, and a request that the thirty days begin June 16. It cannot be held to be an absolute repudiation of the contract on the part of the plaintiff or an absolute refusal on his part to perform his obligation under it which would entitle the defendant to discharge him, assuming that the defendant on such a notification would have been entitled to discharge him finally at that time, on which we express no opinion.

The only contention made by the defendant in support of the ruling that nominal damages only could be recovered is that the elements of damage are too uncertain, and it relies on the case of *Bolles* v. *Sachs*, 37 Minn. 315. But the case of *Carnig* v. *Carr*, 167 Mass. 544, decides that they are not. The contract in question in *Carnig* v. *Carr*, as in the case at bar, was a contract where the plaintiff had the option of continuing in the defendant's employ or not. It was held that it was enough that the defendant agreed to give him permanent employment if he wished it. The plaintiff had a right to permanent employment and is entitled to damages for being deprived of that right. See also *Johnson* v. *Walker*, 155 Mass. 253.

Evidence of the probable length of life of a man of the plaintiff's age might be relevant on the question of damages. But the question was not how long the plaintiff would be able to breathe but how long he would be able to work, and by the terms of the contract his employment was not so long as he could work but so long as he should perform the duties of the place in a thorough, honest and businesslike manner.

Evidence of the plaintiff's income from the railroad, the express company, the telegraph company and from his outside business during the last year prior to his discharge and his income during the first year after, was offered and excluded. Under the decision that the defendant elected not to discharge the plaintiff for his derelictions of duty, if it was found that he had been derelict, the question of the admissibility of this evidence will not come up again as it did at the trial under consideration, and the question raised by this exception need not be discussed now.

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The other questions of evidence argued are not likely to arise in precisely the same way, and need not be passed upon.

Exceptions sustained.

J. B. Carroll & W. H. McClintock, for the plaintiff.

W. H. Brooks & W. Hamilton, for the defendant.

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EMMA DALTON *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

SARAH A. DALTON *vs.* SAME.

JOHN L. SLANEY *vs.* SAME.

ALICE SPENCE *vs.* SAME.

Hampden. September 22, 23, 1903. — November 25, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Negligence, At railroad crossing.

In actions against a railroad company for personal injuries, from a collision at a grade crossing in Connecticut with an electric car operated by the defendant, it appeared, that by the law of Connecticut the electric car was required to sound a whistle and gong when approaching the crossing, that the plaintiffs were driving in a "canopy top wagon", about nine o'clock on a cloudy evening, that there were two tracks at the crossing, one used for steam cars and the other for electric cars, that the plaintiffs saw a freight train approaching and, after it had passed, drove within fifty feet of the crossing, listening for signals from an electric car which was due about that time, that, after stopping there a minute and a half or two minutes, the horse became restless and started of his own accord for the crossing, on which the smoke from the freight train had settled down, that at the crossing the plaintiffs listened for signals, and, hearing none, started to cross and were struck by the electric car going at a speed of about twenty-five miles an hour, that when the plaintiffs arrived at the crossing they were for the first time aware of the serious interruption to their view caused by the smoke, and that while stopping there they had reason to think that the smoke would not disappear quickly. *Held*, that, on this and other evidence, the questions whether the signals required by law were given by the defendant, whether the failure to give them contributed to the accident, and whether in approaching the crossing and attempting to cross it the plaintiffs were in the exercise of due care, were for the jury.

FOUR ACTIONS OF TORT for personal injuries from a collision at a grade crossing at Forestville in Connecticut with an elec-

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tric car operated by the defendant. Writ dated October 1, 1902.

At the trial in the Superior Court before *Maynard*, J., the jury returned a verdict for the plaintiff in each case; and the defendant alleged exceptions.

W. S. Robinson, for the defendant.

J. B. Carroll, for the plaintiffs.

HAMMOND, J. The defendant's theory of this accident is that the whistle and gong of the electric car were sounded as required by law, that at a time when the view of the third rail track was obstructed by the freight train and by the smoke from the engine so that the plaintiffs could not see whether or not an electric car was approaching, and while the noise of the train was so great as to lessen very much the chances of hearing the sound of the signals, the plaintiffs, without waiting for these temporary hindrances to sight and hearing to disappear, and indeed without looking or listening, entered upon the crossing and attempted to pass over it immediately after the caboose of the train had cleared the highway. It must be said that there was much evidence direct and indirect to support this theory, and it might reasonably have been expected that the jury would adopt it. Upon such a theory a verdict for the defendant would have been the necessary result.

But it must also be said that, if the evidence for the plaintiffs was believed, the jury were warranted in rejecting this theory. The crossing was in the State of Connecticut, and, in accordance with the law of that State, the jury were instructed in substance that the defendant could not be found negligent if the whistle and gong of the electric car were sounded as required by the statutes of that State. Upon the question whether they were so sounded, the evidence, as is quite usual in cases of this nature, was conflicting, witnesses called by the defendant positively testifying that the signals were given and witnesses called by the plaintiffs testifying that they listened for the sounds and did not hear them. The evidence on this question need not be rehearsed in detail. It is plain that under our decisions it raised a question of fact for the jury. In this respect the case is clearly distinguishable from cases like *Tully* v. *Fitchburg Railroad*, 134 Mass. 499, and *Hubbard* v. *Boston & Albany Railroad*, 159 Mass.

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320, 323, and must be classed with those like *Menard* v. *Boston & Maine Railroad*, 150 Mass. 386, and *Davis* v. *New York, New Haven, & Hartford Railroad*, 159 Mass. 532. If the signals were not given, then the defendant might have been found negligent, and upon the whole evidence the jury might have concluded that this negligence was contributory to the accident.

The more difficult question is whether the evidence was sufficient to warrant the finding that the plaintiffs were in the exercise of due care. Many of the facts are not in dispute. The four plaintiffs were in an open "canopy top wagon," which with the single horse attached had been hired at a livery stable by Slaney for that ride; and he was driving. There were two tracks at the crossing, the southerly being used only for the cars propelled by steam and the northerly, called the third rail track, being used only for the electric cars. A little after nine o'clock in the summer evening the plaintiffs were in the vicinity of this crossing; and, as they were approaching it from the south and were opposite the house of one Davitt, which was about two hundred and fifty feet from it, they observed a west bound freight train approaching it from the east. After the train had passed over, Slaney drove to the crossing, and as he reached the northerly track his team was struck and overturned by an electric car which came from the west at a speed of about twenty-five miles an hour. Going westerly from the crossing, the grade of the track ascends, and the engine after passing the crossing emitted considerable smoke which settled upon the third rail track, thus more or less obscuring the plaintiffs' view. Slaney was familiar with the crossing and knew that an electric car was scheduled to reach it from the west shortly after nine o'clock. He testified however that at the time he thought it was hardly time for the car to reach there. Both the highway and the railway tracks were above the surface of the adjacent ground, and to one standing in the highway there were no permanent objects to obstruct the view of the tracks for a distance of several hundred feet either side of the crossing. The evidence introduced for the plaintiffs tended to show that they stopped opposite Davitt's house "two minutes or so"; that during that time the freight train was passing the crossing, and that they were looking up and down the track and listening for signals; that at that time

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the engine was puffing and emitting considerable smoke; that before the train had entirely passed the crossing they started and drove to within fifty feet of it, looking during the time and listening for signals from the electric car; that they then stopped "probably a minute and a half or two minutes," and again looked and listened for the signals; that while stopping there the caboose passed the crossing and immediately the horse, which had become somewhat restless, started of its own accord for the crossing; that Slaney stopped the horse when its head was possibly over the first rail of the southerly track; that while there the plaintiffs looked down the track towards the west; that the smoke from the engine "settled right down on the third rail track" up to within fifty feet of the crossing; that while there they listened for signals from the electric car but could hear none, and then, believing the track to be clear, they started to cross, and just as the horse reached the northerly track the light of the electric car "came right out of the cloud," three sharp whistles instantly sounded, and the team was struck. The evidence introduced by the plaintiffs tended further to show that the night was dark and cloudy; that while the plaintiffs were stopping at the southerly track the freight train had passed so far that the view of the third rail track was no longer obstructed by that train but only by the smoke and the darkness; that there was but little, if any, wind; that upon getting to the southerly track the plaintiffs were for the first time aware of the serious interruption to the view caused by the smoke, and that while stopping there they had reason to think that it would not quickly disappear. In this position, with a horse which already had manifested some symptoms of uneasiness which might lead to some apprehension as to what it might do, the plaintiffs, according to their own testimony, looked as well as they could and listened, and, hearing no whistle or gong, thought that there was no electric car and that it was better to cross than to wait for the lagging smoke to rise.

Under all the circumstances of the case, the question whether the plaintiffs were in the exercise of due care in approaching the crossing and in attempting to cross it without waiting for the smoke to disappear, was for the jury. The case must stand with cases like *Randall* v. *Connecticut River Railroad*, 132 Mass. 269,

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and not with those like *Debbins* v. *Old Colony Railroad*, 154 Mass. 402. We see no error in the way the court dealt with the requests for instruction.

Exceptions overruled.

SARAH S. SIMPSON *vs.* PRUDENTIAL INSURANCE COMPANY OF AMERICA.

Hampden. September 23, 1903. — November 25, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Infant.

An infant may avoid a contract of life insurance and recover the money paid by him as premiums, however reasonable and prudent it may have been for him to take out the policy.

In this Commonwealth an infant in order to avoid a contract is not obliged to put the other party *in statu quo*. Thus an infant may recover money paid by him as premiums under a policy of life insurance without any deduction for the expense incurred by the insurer in keeping the policy in force.

If, for an infant to avoid a contract of life insurance, the bringing of an action for the premiums paid under the policy is not in itself sufficient rescission and demand, notice of rescission and demand for the premiums through an attorney appointed by the infant are good, at any rate until avoided by him.

MORTON, J. The plaintiff in this case is a minor and brings this action by her next friend to recover the premiums paid by her on a life insurance policy issued to her by the defendant. The case was heard upon agreed facts, and judgment was ordered for the defendant and the plaintiff appealed. The policy was what is termed a twenty year endowment policy for $500, and the agreed facts state that there was no fraud or undue influence practised upon the plaintiff by the defendant or its agents, and that the contract was a reasonable and prudent one for a person in the plaintiff's situation and condition in life. Before the action was brought the plaintiff through her attorney had notified the defendant that she repudiated the policy and the contract contained in it, and demanded a return of the sums that she had paid as premiums. The premiums paid amounted to $54, and it is agreed that the expense to the

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defendant of keeping the policy in force was $28.72. The defendant contends that this should be deducted from or set off against the premiums if the plaintiff is allowed to recover for them.

It is manifest, we think, that however reasonable and prudent it may be for an infant to take out a policy of life insurance, it does not come within the class of necessaries, or within the class of contracts which have been held as matter of law to be beneficial to and therefore binding upon an infant. It is only when the contract comes within the class of contracts which as matter of law are binding upon an infant that the question of its reasonableness and prudence is material. *Tupper* v. *Cadwell*, 12 Met. 559.

The defendant contends that the contract having been executed in part at least the plaintiff cannot recover without making the defendant whole for the expense to which it has been subjected. But that would be compelling the plaintiff to carry out to that extent a contract which is not binding on her and which she may avoid. *Morse* v. *Ely*, 154 Mass. 458.

It is well settled in this Commonwealth, whatever may be the law elsewhere, that in order to avoid a contract an infant is not obliged to put the other party *in statu quo*. *Gillis* v. *Goodwin*, 180 Mass. 140, and cases cited. *White* v. *New Bedford Cotton Waste Co.* 178 Mass. 20.

The defendant further contends that there has been no rescission because the notice and demand were made by an attorney, and an infant cannot appoint an agent or attorney and the authority of a *prochein ami* is only commensurate with the writ. *Cassier's case*, 139 Mass. 458. *Miles* v. *Boyden*, 3 Pick. 213. *Burns* v. *Smith*, 29 Ind. App. 181. 1 Am. & Eng. Encyc. of Law, (2d ed.) 940.

If we assume that the bringing of the action did not of itself constitute all the rescission and demand that was necessary, then we are of the opinion that the appointment of an agent for the purpose of giving notice of rescission and making a demand was not such an act under the circumstances of this case as could be held as matter of law to be prejudicial to the plaintiff and therefore void but that it was at the most only voidable, and therefore the notice and demand until avoided by the plaintiff would

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be sufficient. *Whitney* v. *Dutch*, 14 Mass. 457. *Towle* v. *Dresser*, 73 Maine, 252.

Judgment reversed and judgment for the plaintiff.

N. P. Avery, for the plaintiff.

H. P. Small, for the defendant.

NATHANIEL PAINE, trustee, *vs.* HARRY H. PRICE & others.

Worcester. September 28, 29, 1903. — November 25, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Will. Power. Probate Court. Jurisdiction.

Under R. L. c. 135, § 9, excepting from revocation by marriage so much of a will as is made in the exercise of a power of appointment, unless the property thus disposed of would pass in default of appointment to the persons who would have been entitled to it if it had belonged to the donee of the power and he had died intestate, in a case where in default of such appointment a fractional part of the property appointed would have gone to the donee of the power, the exercise of the power by the will of the donee is revoked by marriage as to such fractional part and stands unrevoked as to the remaining portion of the property appointed.

The question, whether an appointment by will is revoked by the marriage of the donee of the power, does not involve the validity of the will, and is not affected by a declaration concerning it in a decree of a probate court allowing the will.

BILL IN EQUITY, filed January 30, 1903, in the Probate Court for the county of Worcester, by the trustee under the will of George A. Trumbull, late of Worcester, for instructions.

On appeal the case came on to be heard before *Barker*, J., who, at the request of the parties, reserved it upon the petition, the answers and the agreed facts for determination by the full court.

The agreed facts were as follows:

George A. Trumbull left a will admitted to probate on December 1, 1868, containing the following provisions:

"Fifth. I give the sum of five thousand dollars to be paid out of my estate immediately on the decease of my wife aforesaid, in case my daughter Susan shall be then living, but not

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otherwise, to my said sons George C. and Joseph in trust and to and for the following uses and purposes, and no other, to wit: to receive, invest and reinvest the same, and to pay over the net income thereof semi-annually after deducting all current expenses and charges, to my daughter Susan, and at her decease to dispose of the principal sum as she shall, by her last will direct; or if no such will shall be presented for probate within six months after her decease, then said principal sum to go with the residue of my estate, as hereinafter specified.

"Sixth. As an evidence of my love and gratitude for her unceasing efforts to promote my happiness and welfare I give to my said wife the income for her life of all the personal and real estate I may die possessed of, not otherwise bequeathed, said property at her decease to be equally divided between my sons George C., Joseph, Charles P. and John, my daughter Susan and Isabella F. and my grand daughter Mary Louisa Trumbull Cogswell, as representing her deceased mother."

Susan Trumbull, daughter of George A. Trumbull, made a will dated May 1, 1894, before her marriage but not in contemplation thereof, and after its execution in 1902, married Harry H. Price. The executrix named in her will petitioned the Probate Court for the county of Worcester for the probate of the will, and that court made thereon the following decree on December 30, 1902: "It is therefore decreed that said instrument be approved and allowed as the last will and testament of said deceased, to have full force and effect as such so far as the same can operate in law or in equity upon any and all property real and personal subject to her disposal by way of appointment under the will of George A. Trumbull late of said Worcester, deceased, or otherwise, and it further appearing that said testatrix married the said Harry H. Price since the execution of said will and that said will was not made in contemplation of such marriage, it is decreed that said will was thereby revoked except as to all real and personal property subject to her disposal by way of appointment. William T. Forbes, Judge of Probate Court." From this decree no appeal was taken.

One paragraph in the will of Susan Trumbull Price was as follows: "To my niece Mary Louisa T. Cogswell, I give and bequeath the legacy of five thousand ($5,000) dollars given me by

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my father George A. Trumbull, said sum now in the hands of Winslow S. Lincoln, trustee."

Nathaniel Paine, the petitioner, was appointed the trustee, under the fifth clause of George A. Trumbull's will, to succeed former trustees, and brought this bill for instructions as to the disposition of the $5,000 referred to in the wills of George A. Trumbull and Susan Trumbull Price against the husband, the next of kin, and the administrator of Susan Trumbull Price and against Mary L. T. Cogswell named in the above paragraph of the will of Susan Trumbull Price and who also was one of her next of kin.

On this petition the Probate Court made the following decree on March 19, 1903: "it appearing that notice according to the order of the court has been given to all parties interested and that George S. Taft as administrator aforesaid [of the estate of Susan Trumbull Price], Harry Hamilton Price and Mary L. T. Cogswell have appeared and answered to said petition it is ordered that said petition be taken for confessed against all respondents who have failed to answer and after due hearing and consideration the court doth decree that Louisa C. Trumbull, widow of said George A. Trumbull, having deceased, the entire principal of said trust estate held by said trustee as set forth in said petition, together with the income thereof since the death of Susan Trumbull Price belongs to the respondent, Mary L. T. Cogswell, free from all trusts, and said trustee, Nathaniel Paine is hereby ordered to forthwith pay over to said Mary L. T. Cogswell the whole of said trust funds."

From this decree George S. Taft, administrator, appealed.

Mary L. T. Cogswell, one of the respondents, claimed the whole of the fund, amounting to over $7,000, by virtue of the paragraph above quoted from the will of Susan Trumbull Price and of the decree of the Probate Court thereon, claiming that the paragraph was made in the exercise of the power of appointment, and constituted a valid appointment of the whole of the fund to Mary L. T. Cogswell, according to the provisions of R. L. c. 135, § 9.

George S. Taft, administrator of the estate of Susan Trumbull Price, claimed one seventh of the fund as assets of the estate of Susan Trumbull Price on the ground that one seventh would,

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without the appointment, have passed to the persons who would have been entitled to it, if Susan Trumbull Price had died intestate, within the meaning of the statute.

T. H. Gage, Jr., for Price.

T. G. Kent, for Mary L. T. Cogswell.

G. S. Taft, administrator, *pro se.*

A. H. Bullock, for the trustee, appeared, but made no argument and filed no brief.

LORING, J. So far as a will is the exercise of a power of appointment, it is excepted from the act declaring that a marriage shall act as a revocation of a will not made in contemplation of it. The reason for this exception is that the donee of a power, in making an appointment, is acting for the donor in disposing of the donor's property. But where the property in question goes in default of appointment to those who would have been entitled to it had it been the property of the donee of the power and he had died intestate, a case arises where the property to be disposed of by the appointment is for all practical purposes the property of the donee of the power, and for that reason it is taken out of the exception and left within the operation of the act. R. L. c. 135, § 9.

In the case at bar the one undivided seventh which in default of appointment went to Susan Trumbull, afterwards Mrs. Price, comes within the modification of the exception and is revoked by her marriage. We see no difficulty in holding that the effect of the statute (now R. L. c. 135, § 9,) is to revoke the appointment so far as it operates on property which in default of appointment belongs to the donee of the power, and at the same time in holding that it is unrevoked so far as it operates on property which in default of appointment goes to strangers.

The question whether the appointment by will is revoked by the subsequent marriage of the donee of the power is a question arising as to the exercise of the power, not as to the validity of the will. For that reason it is not concluded by the terms of the decree of the Probate Court in allowing the will in question.

Decree reversed.

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WILLIAM THOMPSON *vs.* CITY OF WORCESTER.

Worcester. September 29, 1903. — November 25, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Negligence. Municipal Corporations. Evidence, Opinion, Experts.

In an action against a city for personal injuries from the breaking of a plank on which the plaintiff was working with another man, both of them belonging to a gang of city employees engaged in setting up a portable overhead railway to be used for carrying buckets in excavating a trench to hold a sewer pipe, it appeared, that there was a knot as large as the palm of a man's hand in the centre of the plank where it broke, and that such a plank would not hold two men, that there was a foreman present but that he took no part in selecting the planks used like this one as temporary stagings, and that the planks used for that purpose were selected by workmen on the ground from a pile of planks which had been delivered at the side of the street for general use in the work, and were handed up to other workmen on the uprights of the structure as they called for them. *Held*, that there was no evidence of negligence on the part of the defendant, which performed its whole duty toward the plaintiff by furnishing enough sound planks and employing competent persons as his fellow workmen.

A witness who has been a contractor and builder for fourteen years, but who never has made a study of the bearing strength of wood, may be found not to be qualified as an expert to testify to the weight which would be borne by a spruce plank twenty feet long, twelve inches wide and two inches thick, with a knot as large as the palm of a man's hand in the middle of it.

TORT for personal injuries, from the breaking of a plank used as a staging, on which the plaintiff was standing while at work in the employ of the city of Worcester as a laborer in the construction of a certain sewer in that city, with a count alleging negligence of a superintendent of the defendant in regard to the construction of the staging and in ordering the plaintiff to work upon it, a second count alleging a failure of the defendant to furnish the plaintiff with suitable appliances for his work, and a third count, added by amendment, alleging a defect in the ways, works and machinery of the defendant. Writ dated June 4, 1900.

At the trial in the Superior Court *DeCourcy*, J. ordered a verdict for the defendant; and the plaintiff alleged exceptions.

C. C. Milton, G. A. Gaskill & H. H. Fuller, for the plaintiff.

A. P. Rugg, for the defendant.

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LORING, J. The plaintiff was one of a gang of fourteen or fifteen city employees engaged in setting up a portable overhead railway, used for carrying buckets back and forth in excavating a trench to hold a sewer pipe. The railway was made up of sections sixteen feet long. Each section consisted of two upright joists at each end of the section, braced across, and carrying a girder on the braces on the top of the uprights. The railway for the travellers carrying the buckets back and forth was suspended from and below this girder. The plaintiff and another man were screwing the track on to the girder over the second section, when the staging broke on which they were standing, and the accident happened which is here complained of. The staging for each section consisted of a single plank which was laid on two cross braces, one at each end of the section, resting on and in iron hooks driven into the forward end of the uprights for the purpose. The number of sections in the railway in question was variously stated to be eight, ten and twelve, but it appeared that all of them had been set up in the forenoon of the day in question, and also that the temporary planks which made the staging for screwing on the railway had been laid in that forenoon in all the sections.

After dinner the plaintiff and another man went to the middle of the plank on the second section, to screw on the railway, when, as we have said, the plank broke. The planks used for these stagings were taken from a pile of new spruce planks twelve inches wide and two inches thick, which had been delivered on the side of the street that forenoon for general use in the work. Four or five had been taken to construct the platform for the engine, and they "were sometimes used for other purposes. They put them in the ditch as sheathing." The number of planks in the pile when they were delivered was estimated to be from twenty to thirty, and the number left at the end of the day's work in question from nine to ten. The work was in charge of one Fox, who was foreman in the defendant's sewer department. There was no testimony that Fox selected any of the planks to be put on the braces to form the temporary stagings, or that he took any part in putting them up beyond the fact that he was present superintending the work generally, if that be a fact which under the circumstances of this case warrants that conclusion.

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The plaintiff's witnesses testified that when the time came to put on the planks, the men who were up on the uprights would call for a plank; then the men who were on the ground would get one from the pile and either hand it up "by forks made to lift the plank," or haul it up by a rope thrown over the girder. The planks used as a staging from which to screw the track on to the girder are taken off and the braces on which they are laid are taken down when the work of putting the track in place is done.

It appeared that there was a knot as large as the palm of a man's hand in the centre of the plank where it broke, and that such a plank would not hold two men.

It is plain that the staging in question was a staging even more temporary in character than the stagings in question in *Kelley* v. *Norcross*, 121 Mass. 508; *Colton* v. *Richards*, 123 Mass. 484; *Killea* v. *Faxon*, 125 Mass. 485; *Clark* v. *Soule*, 137 Mass. 380; *Hoppin* v. *Worcester*, 140 Mass. 222; *O'Connor* v. *Neal*, 153 Mass. 281; *Kennedy* v. *Spring*, 160 Mass. 203; *Adasken* v. *Gilbert*, 165 Mass. 443; *Brady* v. *Norcross*, 172 Mass. 331; *Callahan* v. *Phillips Academy*, 180 Mass. 183. It was more like the staging in question in *Morris* v. *Walworth Manuf. Co.* 181 Mass. 326.

The case before us is a case where the men on the uprights called for the planks as they were needed and the workmen on the ground selected them from the pile of planks provided for general use. In such a case the master performs his whole duty by furnishing enough sound planks and employing competent persons as fellow workmen.

It differs from *Arkerson* v. *Dennison*, 117 Mass. 407. In *Arkerson* v. *Dennison* "The plaintiff was injured by the falling of a staging, upon which he was directed to go by the defendant," and "the staging had been erected before the plaintiff entered the employment of the defendant," in the words used by Wells, J. in beginning his opinion in that case. And further, the testimony given by Mehan, who with Bennett did the work of constructing the staging in that case, warranted the finding that the work of constructing the staging had not been intrusted to the workmen and was retained by the defendant.

In the case at bar we do not think that the testimony of the

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superintendent of sewers warranted a finding that it was the duty of Fox, who had general superintendence of the work, to see that this staging was safe.

In *Brady* v. *Norcross*, 174 Mass. 442, 448, also relied on by the plaintiff, there was evidence that the defect in the staging was called to the attention of one who was a superintendent within the employers' liability act.

The case does not come within *McIntyre* v. *Boston & Maine Railroad*, 163 Mass. 189. The rule there applied is the rule where a manufactured instrument is supplied by the master (see *Callahan* v. *Phillips Academy*, 180 Mass. 183, 186, 187, and *Colton* v. *Richards*, 123 Mass. 484, 487,) and does not apply to a case where material is furnished out of which an instrument is to be manufactured. Although the stagings for each section were made by laying a single plank on the braces when they had been put in position, we do not think that the planks come within the rule as to manufactured articles.

The plaintiff relies on *Prendible* v. *Connecticut River Manuf. Co.* 160 Mass. 131, in support of his contention that the judge was wrong as matter of law in finding as a fact that a witness who had been a contractor and builder for fourteen years, but who never had made any study with reference to the bearing strength of wood, was not qualified as an expert to testify to the weight which a spruce plank would bear which was twenty feet long, twelve inches wide and two inches thick, with a knot as large as the palm of a man's hand in the middle of it. But there is nothing in *Prendible* v. *Connecticut River Manuf. Co.* which supports this contention. In that case it was held that an engineer could be allowed to give his opinion as to whether a staging erected in a specified way could safely be trusted to carry a particular weight on the ground "that a person who has made a special study of the strength of materials and the proper mode of building structures to sustain weight" may be allowed so to testify. No question was raised as to that engineer's being qualified as an expert, and so far as the case goes it supports the ruling made at the trial.

Exceptions overruled.

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ELLEN VALLIE, administratrix, *vs.* AMOS B. HALL.

Worcester. September 29, 1903. — November 25, 1903.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND, LORING, & BRALEY, JJ.

Master and Servant. Negligence, Employer's liability.

If the owner of a building leased to another retains an office in it, furnishes materials for keeping the building in order, and hires, pays and directs an "all round" man employed to do general repairs in the building, and if the owner goes to the basement of the building where this man is at work and orders him to empty certain varnish from a leaking barrel into other receptacles, and the man in doing this work is injured, the relation of master and servant may be found to have existed between the two at the time of the injury.

In an action against the owner of a building, for personal injuries from an explosion of varnish which the plaintiff had been ordered by the defendant to empty from a leaky barrel into other receptacles, it appeared that the plaintiff was an experienced carpenter employed by the defendant as an "all round" man to do general repairs in the building, and the defendant was not shown to have had any knowledge of the qualities of varnish other than that of an owner of buildings in the care of which he had caused varnish to be used. The plaintiff in the course of his work procured a lantern and held it near the bunghole of the barrel of varnish, when the explosion occurred. *Held*, that there was no evidence that the defendant had more knowledge of the danger or more opportunity for such knowledge than the plaintiff, and, as the plaintiff was proceeding under general directions and his injury came from the way he selected for doing the work, his injury if not caused by his own negligence was without fault on the part of the defendant.

TORT for personal injuries alleged to have been received by the plaintiff's intestate while in the employ of the defendant. Writ dated January 10, 1902.

At the trial in the Superior Court before *Hardy*, J., there was evidence, that the plaintiff's intestate was employed as an "all round" man to do carpentering and general repairs at the Commonwealth Hotel in Worcester, owned by the defendant, leased to one Sanderson and occupied at the time of the accident by one Salla as assignee of the lease; that, while the plaintiff's intestate was at work in the basement of the hotel, the defendant came there and ordered him to empty a large barrel of varnish that had been leaking and to put the varnish into certain cans and a smaller barrel which were there, that there were steam pipes in the basement which was a hot place, hotter

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than a bakery; that the intestate, having filled some of the cans, was filling the small barrel, that his son, a boy eleven years of age at the time of the trial, was with him, and testified that he told his father that the small barrel was almost full, whereupon the intestate tried to turn on an electric light overhead, to see how much varnish was left in the barrel, that the fuse of the electric light had burned out, and the intestate sent the boy to get a lantern from the engineer, that the intestate took the lantern and holding it almost a foot from the barrel looked into the bunghole where the varnish had run out, when an explosion occurred from which the intestate received his injuries.

At the close of the evidence the judge refused to rule that upon the evidence and the pleadings the plaintiff was not entitled to maintain her action. The jury returned a verdict for the plaintiff in the sum of $1,500; and the defendant alleged exceptions, including an exception to certain portions of the judge's charge. The questions raised appear by the opinion.

The case was argued at the bar in September, 1903, before *Knowlton*, C. J., *Morton*, *Barker*, *Hammond*, & *Loring*, JJ., and afterwards was submitted on briefs to all the justices.

B. W. Potter & *P. Potter*, for the defendant.

R. Hoar, for the plaintiff.

BARKER, J. We think there was evidence for the jury upon the issue whether the relation of master and servant existed between the plaintiff's intestate and the defendant who was the owner of the building in which the intestate was employed. According to the defendant's own testimony he had his own office in the building, furnished materials for keeping it in order and when consulted by the intestate as to what should be done by the latter with the varnish which the defendant owned did not refer him to any one else for directions. The defendant also admitted that at one time he had hired the intestate to finish off some rooms in the upper part of the building. The first lessee testified that the defendant hired the intestate and gave him orders and paid him, and the boy who was present at the time of the explosion testified that the defendant came down to the basement and directed the intestate to do the work upon which he was engaged when hurt. There was evidence from which the jury could find that that work was not a mere single instance of gratuitous service.

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The defendant was not shown to have had any knowledge of the qualities of varnish other than that of an owner of houses and buildings in the care and keeping in order of which he had caused varnish to be used. The intestate was a man of mature years having a son who was eleven years of age at the time of the trial. He was a carpenter by trade and had worked for the Norcross concern as well as for others, and there was no dispute but that he had been employed at the building which was a large one comprising a hotel, with stores and offices, for some years as an all round man to make repairs and keep things in order. The plaintiff herself testified that he did "everything and repairing" around the building, and there was nothing to contradict the testimony of the defendant and of the later lessee that the intestate did painting. But even if the jury should disbelieve that testimony there was nothing to throw doubt upon the fact that the intestate was a carpenter of experience. We think it follows that he must be deemed to have had equal knowledge of the qualities of varnish with that with which the defendant from his own knowledge and experience must be deemed to have had. It was for the plaintiff to produce evidence from which fairly the inference could be drawn that the defendant knew the danger of an explosion while the plaintiff's intestate did not. In our opinion the evidence would justify no such inference. Whether the intestate did painting or not his experience as a carpenter as well as his work as an all round man in the building where he was hurt must have given him as great familiarity with varnish as the defendant's experience with the care and repair of buildings could give.

The case seems to us one in which all that fairly can be said is that the employer had no more knowledge of the danger and no more opportunity for such knowledge than the servant, and that the servant proceeding under the most general directions to do by himself and in his own time and way a certain work which could have been done with safety and receiving an injury which came from the way which he himself selected, was injured if not by his own negligence, at least without any fault on the part of his employer, so far as fairly could be found from the evidence. If the danger was obvious, one knew it as well as the other. If it was unknown to the intestate the evidence would

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not justify a finding that it was better known to the defendant, or that he had had better opportunity to know it, than his servant.

Exceptions sustained.

CHARLES T. TATMAN, trustee, *vs.* JOHN B. HUMPHREY.

Worcester. September 29, 1903. — November 25, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Bankruptcy.

Under the bankruptcy act of 1898, if the holder of an unrecorded chattel mortgage, made two years before the bankruptcy of the mortgagor when he was not insolvent, first takes possession of the mortgaged property three weeks before the filing of the petition in bankruptcy, the mortgagor then being insolvent and the mortgagee having reasonable cause to believe him insolvent, the transfer dates from the time of taking possession and is voidable as a preference.

TORT, by the trustee in bankruptcy of the estate of Nelson H. Davis of Worcester, for the value of the bankrupt's stock of jewelry alleged to have been converted by the defendant, who, having reasonable cause to believe that Davis was insolvent, took possession of the stock about three weeks before the filing by Davis of a voluntary petition in bankruptcy, claiming it under an unrecorded mortgage executed about two years earlier when Davis was not insolvent. Writ dated November 13, 1901.

In the Superior Court *Gaskill*, J. found *pro forma* for the defendant upon a statement of agreed facts, and, judgment having been entered upon the finding, the plaintiff appealed.

C. T. Tatman, pro se.

W. H. Brown, for the defendant.

KNOWLTON, C. J. The question in this case is whether the defendant's title under an unrecorded mortgage of personal property, made to him more than two years before the bankruptcy of the mortgagor, which covered the stock of goods and fixtures then owned by the mortgagor and such future additions as he should make thereto, and which was made to secure payment of certain notes and of future indebtedness, is good against the trustee in bankruptcy of the mortgagor. Under the R. L. c. 198,

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§ 1, because of the failure to record the mortgage within fifteen days of the date written therein, and because the property had not been delivered to and retained by the mortgagee, the mortgage was not valid against any person other than the parties thereto. *Haskell* v. *Merrill*, 179 Mass. 120. About three weeks before the commencement of the proceedings in bankruptcy, the mortgagor then being insolvent and the defendant having reasonable cause to believe him insolvent, the defendant took possession of the property covered by the mortgage, by removing it from the mortgagor's store, and afterwards retained it. After taking possession he served a notice of his intention to foreclose the mortgage under the provisions of the Pub. Sts. c. 192, §§ 7, 9.

The defendant's acquisition of possession of the mortgaged property before the commencement of the proceedings in bankruptcy, and before third persons had acquired liens or rights by attachment or otherwise, gave him a title which was good at common law against creditors, and which would have been good against an assignee in insolvency under the statutes of this Commonwealth, or against an assignee in bankruptcy under the United States bankruptcy act of 1867. *Folsom* v. *Clemence*, 111 Mass. 273. *Chase* v. *Denny*, 130 Mass. 566. *Blanchard* v. *Cooke*, 144 Mass. 207. *Bennett* v. *Bailey*, 150 Mass. 257. *Bliss* v. *Crosier*, 159 Mass. 498. *Haskell* v. *Merrill*, 179 Mass. 120. *Gibson* v. *Warden*, 14 Wall. 244. *Sawyer* v. *Turpin*, 91 U. S. 114.

The question of difficulty in the case arises under the United States bankruptcy act of 1898, whose provisions in regard to preferences and acts of bankruptcy differ materially from those of the bankrupt act of 1867. In *Wilson* v. *Nelson*, 183 U. S. 191, (7 Am. B. R. 142,) the Supreme Court of the United States, in an elaborate opinion, discussed this difference, and pointed out its effect in cases similar to the present. In that case the bankrupt when solvent, nearly thirteen years before his bankruptcy, gave an irrevocable power of attorney to confess judgment for a debt which he then contracted, and this power was exercised by the creditor shortly before his bankruptcy.

Among the acts of bankruptcy mentioned in § 3 *a* of the act, one is defined as follows: having "suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or

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final disposition of any property affected by such preference vacated or discharged such preference." In § 67 *f*, it is provided "that all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same," etc. In § 67 *c*, it is declared that "a lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference," etc. In view of these and other provisions of the act, it was decided, in the case just cited, that suffering and permitting the creditor to obtain a preference through legal proceedings was an act of bankruptcy by the express provisions of the statute, irrespective of any active intent of the debtor at that time, to hinder, delay or defraud his creditors, or to give a preference, and notwithstanding that the power of attorney to confess judgment was given many years before, and it was said that the preference could be avoided and the property recovered by the trustee. It was held that in determining the time of an alleged act of bankruptcy, it must be deemed to have occurred when something open and notorious was done affecting the debtor's estate. It is also said in the opinion that "the act of 1898 makes the result obtained by the creditor, and not the specific intent of the debtor, the essential fact."

Under another clause of the statute the same distinction is drawn between this and the former act in the case of *In re Klingaman*, 101 Fed. Rep. 691 (4 Am. B. R. 254) where it is said that "The intent of this section is to declare that, as against creditors of an insolvent, the limitation of time for invoking relief against a preference does not begin to run until in some

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form they have received actual or constructive notice of the transfer to the preferred creditor; and this intent is reached by the declaration that in such cases the transfer constituting the act of bankruptcy shall be held to date from the time the instrument of transfer is recorded, or the possession is taken, or notice is otherwise brought home to the creditors of the bankrupt." The facts in this case were somewhat analogous in principle to those in the case at bar. Other federal decisions tend in the same direction. *White* v. *Bradley Timber Co.* 119 Fed. Rep. 989. *In re Metzger Toy & Novelty Co.* 114 Fed. Rep. 957. *In re Wright Lumber Co.* 114 Fed. Rep. 1011. *In re Sheridan*, 3 Am. B. R. 554.

Even though the proceedings by which the mortgagee obtained his lien, three weeks before the filing of the petition, were not proceedings in court, and not legal proceedings if the term is construed narrowly, they were proceedings to enforce his legal rights. If the present case is not covered by the decision in *Wilson* v. *Nelson*, *ubi supra*, the principles upon which the two cases rest are very similar.

In § 3 *a*, one of the acts of bankruptcy mentioned is having "transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors." In the same section under *b*, the time for filing a petition founded on such an act of bankruptcy is within four months after "the date of the recording or registering of the transfer or assignment . . . if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment."

In view of these several provisions, and the language of §§ 60 *a* and 60 *b*, and the construction put upon the statute by the Supreme Court of the United States, we are of opinion that, in the case of a preference by way of an unrecorded chattel mortgage, the transfer dates, under the bankruptcy act of 1898 and the amendatory act of February 5, 1903, from the acquisition of possession under the mortgage.

In *Mathews* v. *Hardt*, 79 App. Div. (N. Y.) 570 (9 Am. B. R. 373) the appellate division of the Supreme Court of New York,

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in a well considered opinion, made a decision which entirely covers the present case. The court held that the preference should be deemed to have been obtained at the time when possession was taken, though the taking of possession was merely to effectuate an agreement made in good faith and many months before the prohibited time for making the transfer. The case at bar certainly falls within the spirit and reason of the statute as interpreted in these decisions. The reason for the enactment as it is interpreted is well illustrated by the fact that the mortgagor in this case, less than four months before the proceedings in bankruptcy, made a statement to certain of his creditors and to commercial agencies, that there was no incumbrance on his stock or fixtures, a statement which was literally true if we look only to the state of the title as against creditors, but wickedly false in its understood meaning if the mortgagee, on the eve of the debtor's bankruptcy, could take all of the debtor's property and leave nothing for the other creditors who had trusted him because of his possessions.

Judgment for the plaintiff.

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ESSIE HARTFORD, administratrix, *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Worcester. September 29, 1903. — November 25, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Negligence.

In an action against a railroad company for causing the death of the plaintiff's intestate, it appeared, that the plaintiff was in the employ of the proprietor of a factory and was engaged in unloading merchandise from a car, standing on a switch track near the factory, into a chute in the factory connected with the car by a steel "brow" four and one half feet long, three feet wide and one quarter of an inch thick, that the intestate was told by the conductor of the switching crew to "look out" because cars were to be moved, that upon such information it was the duty of the intestate to take down the "brow", that shortly afterwards by order of the conductor a car was moved against the one which the intestate was unloading, and the intestate was found caught between the "brow" and the building, suffering injuries from which he died. *Held*, that, on the evidence in the case, the questions whether sufficient time to remove the "brow" was given

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to the intestate, whether he was performing that duty with due diligence and skill, and whether the conductor was negligent in starting the car without taking more pains to ascertain the situation of the intestate, were for the jury, and that, in view of the damage to life and limb by a premature moving of the car, the question, whether the negligence of the conductor was gross, was for the jury.

TORT, under R. L. c. 111, § 267, against a railroad company, for the death of the plaintiff's intestate alleged to have been caused by the negligence of the defendant or the gross negligence of its agents or servants. Writ dated April 25, 1902.

At the trial in the Superior Court before *Gaskill*, J., there was evidence of the following facts, besides those stated in the opinion:

Robert H. Hartford, the plaintiff's intestate, on the afternoon of May 6, 1901, was in the employ of the Natural Food Company of Worcester, and was engaged in unloading shooks for boxes, from a car standing on a switch track. This unloading was done by throwing the shooks into a chute which ran from near the opening of a window opposite the car door into the basement. The chute was connected with the car by a flat piece of iron, called a brow, about four and one half feet long, three feet wide, and one quarter of an inch thick. One end of the brow lay in the chute, the other, slightly curved, rested on the sill of the car door. It became necessary to remove some cars farther north on the switch track, and to do so it was necessary to move out the car which the plaintiff's intestate was unloading. There was, on the switch track south of the car which the intestate was unloading, a box car filled with shredded wheat biscuit, which was about twelve inches wider than the car that the plaintiff's intestate was in. Word was sent to the defendant's yard master, and an engine and crew immediately were sent to do the work. The engine and crew came up from the yard, fastened to the larger car, then backed and coupled to the one which the intestate was unloading. The cars were moved north about a car's length; there was a cry that some one was hurt, and the cars were stopped. Upon an examination it was found that the plaintiff's intestate was between the cars and the building clinging to the sash of the window, and that the brow had been moved around by the wider car, pinning the deceased to the wall, and causing the injuries from which he died.

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As the cars stood on the siding the car the intestate was unloading was distant from the wall of the building one foot, four and one half inches, and the wider car eleven and one quarter inches.

The conductor and trainmen were familiar with the locus and with the manner in which the employer of the intestate conducted his work. There was a rule of the railroad company for its employees, and likewise a direction from the superintendent of the employer of the deceased, not to move any cars when there was a brow attached to them, or when any person was in the cars.

At the close of the evidence, the defendant requested the judge to rule, that, upon all the evidence, the plaintiff was not entitled to recover, that there was no sufficient evidence to warrant the jury in finding that the plaintiff's intestate was in the exercise of due care at the time of the accident, and that there was no sufficient evidence to warrant a verdict for the plaintiff on the ground that the death of the plaintiff's intestate occurred by reason of the gross negligence of the defendant's agents or servants, engaged in its business.

The judge refused these requests, and submitted the case to the jury upon instructions not objected to. The jury returned a verdict for the plaintiff in the sum of $5,000; and the defendant alleged exceptions.

A. P. Rugg, for the defendant.

E. H. Vaughan, J. A. Thayer & C. B. Perry, for the plaintiff.

HAMMOND, J. The evidence was ample to show that while the plaintiff's intestate was engaged in unloading the car he was told by Carruth, the conductor in charge of the crew who were to remove the cars from the side track, to "look out," because the cars were to be moved; that upon such information it was the duty of the intestate to take down the steel "brow" which connected the car with the chute in the building; that shortly afterwards the cars were moved in obedience to orders from Carruth, and after they had been moved a few feet the intestate was found caught between the "brow" and the building and badly injured. So far the case is plain.

As to many of the other parts of the case the evidence is conflicting, and the defendant stoutly contends that there is nothing

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to show due care of the intestate or gross negligence of the defendant's servants. While it is true that upon the evidence a strong argument can be made in favor of the defendant, still we are of opinion that in view of the weight, size and shape of the "brow," the narrow space between the car and the building, the duty of the intestate upon being warned and the other circumstances of the case, the questions whether sufficient time to remove the "brow" was given to the intestate, whether he proceeded with due diligence and skill to the performance of that duty and was injured while thus acting, and whether Carruth was negligent in starting the car without taking more pains to ascertain the situation of the intestate, were for the jury. And in view of the danger to life and limb by a premature moving of the car under the circumstances, the question whether the negligence of Carruth was gross was also for the jury. For cases somewhat analogous in principle to this case as to some of the questions raised, see *Thyng* v. *Fitchburg Railroad*, 156 Mass. 13; *Maguire* v. *Fitchburg Railroad*, 146 Mass. 379.

Exceptions overruled.

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WILLIAM H. MORRIS *vs.* BOSTON AND MAINE RAILROAD.

Worcester. September 29, 1903. — November 25, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Negligence, Employer's liability.

A section hand, whose duty requires him to stand between two tracks of a steam railroad in clearing deep snow from a switch, and who has to bend down in doing his work, is not in the exercise of due care if he fails to use his eyes in looking both ways for passing trains, relying on rules, not intended for the protection of section hands, which require a whistle to be sounded or a bell to be rung on engines or trains approaching from one direction the place where he is working.

TORT, under the employers' liability act, by a section hand against the railroad company employing him, for personal injuries from being run over near Wachusett station by an east bound extra train of the defendant consisting of a snow plow and

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engine, through the alleged negligence of the engineer in failing to blow a whistle before turning the curve west of Wachusett station or to ring the bell while the train was passing that station, as required by the rules of the defendant. Writ dated February 12, 1902.

At the trial in the Superior Court before *Stevens*, J., the jury returned a verdict for the plaintiff in the sum of $3,500; and the defendant alleged exceptions.

In a book of rules and regulations of the defendant put in evidence by the plaintiff, were the following, which are referred to in the opinion:

"95 (b) Extra trains must be run with care and a sharp look-out kept for signals and for persons and teams at grade crossings, also looking out for and keeping clear of shifting engines and freight cars in yard limits; and give a long whistle one half mile before turning all curves. The speed of extra trains around curves must not exceed twenty-five miles per hour.

"705 Engine men must be sure that the bell is rung before starting a train after each stop and while passing stations.

"739 Section men must know when regular trains are due and keep clear of them. Extra trains may be run over the road without notice, and section men must use the utmost caution at all times as a train may be expected at any moment."

The defendant put in evidence a book of rules for track foremen, Rule 26, referred to in the opinion, being as follows:

"They [track foremen] must instruct their men not to rely upon others to warn them of the approach of engines or trains, but must themselves keep a proper lookout; they must call their attention to the fact that coal is liable to fall from tenders of engines and articles from cars, also that great care and caution must be used in stepping from one track to another in order to avoid a train on either track."

C. M. Thayer, (*J. O. Sibley* with him,) for the defendant.

J. E. McConnell, (*J. W. McConnell* with him,) for the plaintiff.

LORING, J. This is an action brought by a section hand run over by an engine pushing a snow plow.

It was the plaintiff's duty to clear out a switch the day after the heaviest snow storm of the year, — a storm which left the

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snow "waist high all over the tracks." The switch in question was east of Wachusett station. Going west from the switch, the place of the accident, Wachusett station was about two hundred yards distant on the right side of the track, and a little west of the station was a sharp curve also on the right.

About four o'clock in the afternoon of the day after the storm, the plaintiff began to clear this switch for the second time that day. The switch led from the east bound track to a side track running parallel with it and re-entering the east bound track beyond Wachusett station. There was no cross over to the west bound track at this point; the switch led from the side track to the east bound track and ended there. The plaintiff testified and the jury were warranted in finding that the snow lay three feet deep between the west and east bound track and about the same on both sides; that the snow was piled high alongside of the track, and in the centre between the tracks. It was not snowing at the time but the wind was blowing very hard, and the snow was drifting and was so blinding that one could hardly see. The point in question was on an embankment where the wind had a clean sweep. Soon after the plaintiff went to work a west bound freight train passed, and the guard on the cow catcher was throwing the snow to such a distance that the plaintiff not only got off the west bound track but crossed over to the other side of the east bound track to let it go by. After this train passed, the plaintiff looked each way and continued digging snow, standing between the east bound and west bound tracks, bending over, with his back to the west and looking to the east. The reason given by him for this was that he could see some one hundred yards only; that against trains running west he had no protection, and against trains running east he relied on the whistle and the bell which he knew were called for by the rules of the company. Only a moment after he looked both ways, the engine with the snow plow came round the curve without sounding the whistle or ringing the bell, coasting down a grade of sixty feet to the mile with steam shut off, and he was struck by it or by the snow it threw off.

It appeared that the foreman had told the plaintiff with other employees the day before the accident, to look out for themselves and keep out of the way of trains, and that a fellow workman had given him the same warning that afternoon.

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The defendant asked the presiding judge to order a verdict for the defendant on the ground that the plaintiff was not in the exercise of due care. This was refused, and a verdict was found for the plaintiff.

We are of opinion that the defendant's exceptions to the refusal to give that ruling must be sustained.

By the nature of his employment a section hand on a steam railroad must look out for passing trains, and such is the settled law of the Commonwealth. *Shepard* v. *Boston & Maine Railroad*, 158 Mass. 174. *Lynch* v. *Boston & Albany Railroad*, 159 Mass. 536. *St. Jean* v. *Boston & Maine Railroad*, 170 Mass. 213. *Jean* v. *Boston & Maine Railroad*, 181 Mass. 197. *Dolphin* v. *New York, New Haven, & Hartford Railroad*, 182 Mass. 509. See also *Shea* v. *Boston & Maine Railroad*, 154 Mass. 31. The rule of law is the same elsewhere. *Aerkfetz* v. *Humphreys*, 145 U. S. 418. *Pennsylvania Railroad* v. *Wachter*, 60 Md. 395. *Carlson* v. *Cincinnati, Saginaw & Mackinaw Railroad*, 120 Mich. 481. This was enforced in the case at bar by Rules 26 and 739 of the defendant railroad, and by a caution to that effect given to the plaintiff by his foreman the day before the accident and by a fellow workman on the very day in question.

The plaintiff however contends that the jury were warranted in finding for him; that they were warranted in finding that his work was such that he had to stand between the tracks and to turn his back to a train coming on the east bound track; that he had a right to rely on the whistle and the bell required by Rules 95 b and 705 to warn him of a train on that track, and if not he used his eyes so far as his work admitted of his doing so.

We are of opinion that the plaintiff is right in his contention that the evidence warranted a finding that he had to stand between the two tracks. But we are of opinion that he was bound to look for trains coming from the west as well as for trains coming from the east. We see no reason why the plaintiff could not have stood at a right angle to both tracks in place of facing the west-bound track and turning his back on the east bound. If he had done so he could have kept an eye out for trains coming in either direction.

Rules 705 and 95 b were not made for the protection of section men, and he had not the right to rely on them that he would

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have had if they had been imposed as a duty on those in charge of the train to be performed for his benefit. The most that can be said of the rules requiring an extra train to whistle before a curve and requiring all trains to ring the bell on passing a station is that they are "admissions of what precautions were proper, and so far as they may have led those to whom they were communicated to expect conduct in accordance with them," as was said in *Shepard* v. *Boston & Maine Railroad*, 158 Mass. 174. But it is settled that they did not excuse the plaintiff from using his eyes. *St. Jean* v. *Boston & Maine Railroad*, 170 Mass. 213. See also in this connection *Wheelwright* v. *Boston & Albany Railroad*, 135 Mass. 225; *Sullivan* v. *Fitchburg Railroad*, 161 Mass. 125; *Davis* v. *New York, New Haven, & Hartford Railroad*, 159 Mass. 532, 535. It is also settled that the fact that the plaintiff had to bend over to do his work did not excuse him from using his eyes. *Lynch* v. *Boston & Albany Railroad*, 159 Mass. 536. *St. Jean* v. *Boston & Maine Railroad*, 170 Mass. 213.

The plaintiff was not entitled to go to the jury on the issue that he exercised due care in using his eyes. He testified that he looked both ways just a moment before he was struck. Whatever just a moment might be found by a jury to mean under other circumstances, it could not be found to mean that the plaintiff looked in time to see the snow plow coming from around the curve just west of Wachusett station or after it came round the curve. There was no evidence at the trial as to the speed at which the snow plow was coming. The plaintiff cannot be taken to have looked at the time he ought to have looked.

The plaintiff has placed great reliance on *Murran* v. *Chicago, Milwaukee & St. Paul Railway*, 86 Minn. 470. The question of the plaintiff's due care in that case depended upon whether the plaintiff was excused from using his eyes by the presence of a third person on whom he had a right to rely for warning, as was the case in *Davis* v. *New York, New Haven, & Hartford Railroad*, 159 Mass. 532. In the case at bar he was relying on a warning from the engine and on that alone.

Exceptions sustained.

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CITY OF BOSTON *vs.* JAMES H. DOYLE & others.

Suffolk. October 21, 1903. — November 25, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Charity. Boston. Franklin Fund. Words, "Congregational", "Lay out."

The codicil of the will of Benjamin Franklin, proved in 1790, gave to the town of Boston a charitable fund, now held by the city of Boston as trustee, and directed that the fund should be "managed under the direction of the Select Men, united with the Ministers of the oldest Episcopalian, Congregational and Presbyterian Churches in that Town." At the time of the death of the testator there were nine selectmen. *Held*, that the selectmen as managers of the trust did not act as officers of the town, that the aldermen of the city of Boston were not their successors as such managers, and that, the selectmen having ceased to exist, the court sitting in equity would appoint, from the class of citizens indicated by the will, nine lay managers of the trust of whom the mayor of Boston *ex officio* should be one.

Christ Church is the oldest Episcopalian church, the First Church is the oldest Congregational church, and the First United Presbyterian Church is the oldest Presbyterian church, in Boston, within the meaning of the terms of the trust created by the will of Benjamin Franklin proved in 1790, directing that the ministers of the oldest Episcopalian, Congregational, and Presbyterian churches in the town of Boston shall be members of the board of managers of that trust.

The codicil of the will of Benjamin Franklin, proved in 1790, giving one thousand pounds sterling to the town of Boston as a charitable fund, contained the following provision: "If this Plan is executed and succeeds as projected without interruption for one hundred Years, the Sum will then be one hundred and thirty-one thousand Pounds of which I would have the Managers of the Donation to the Town of Boston, then lay out at their discretion one hundred thousand Pounds in Public Works which may be judged of most general utility to the Inhabitants such as Fortifications, Bridges Aqueducts, Public Building, Baths, Pavements or whatever may make living in the Town more convenient to its People and render it more agreeable to strangers, resorting thither for Health or a temporary residence." *Held*, that the words "lay out" in the foregoing provision mean more than the adoption of a plan for the use of the money in the way directed, and include the actual expenditure of it in the establishment of public works of the kind described, all of which is to be done by the board of managers as distinguished from the city of Boston, now holding the legal title of the fund, although the board could not compel the city to assume any burden of maintenance or otherwise involving the use of money to be raised by taxation.

A board of managers of a charitable trust may act by a majority vote.

The provision of R. L. c. 149, § 1, requiring the giving of bonds by trustees appointed by a probate court under a will, is not applicable to the managers of a charitable fund created by will.

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BILL IN EQUITY, filed June 11, 1902, by the city of Boston, as trustee of a fund created by a codicil of the will of Benjamin Franklin,* against thirteen aldermen of the city of Boston and three clergymen assuming to act as managers of that fund,† for instructions, upon the following points:

First. Whether the defendant aldermen and clergymen or any of them are managers of that portion of the Franklin fund in the custody and possession of the city treasurer, or have any right, power or authority, and, if so, what right, power or authority in reference to the disposition, management or control of that portion of the fund or any part thereof.

Second. Whether, assuming that the defendant aldermen and clergymen or any of them are the managers of the fund, or in any capacity authorized to dispose of it, the particular purpose or purposes referred to in a certain vote of April 17, 1902, in pursuance of which other votes of May 21, 1902, were passed, are purposes contemplated and permitted by the will and codicil of Benjamin Franklin.

Third. Assuming that the defendant aldermen and clergymen, or some of them, are the managers of the fund, or have some power or authority with reference to the disposition of it, whether such power or authority was not exhausted by certain votes of June 29, 1895, and December 19, 1895, devoting the fund to the erection of a trades school, or by some of the other votes referred to in the bill before the votes of April 17, 1902, and May 21, 1902.

Fourth. What is meant by the following expression in the codicil, to wit, "then lay out at their discretion one hundred thousand Pounds in Public Works which may be judged of most general utility to the Inhabitants such as Fortifications, Bridges, Aqueducts, Public building, Baths, Pavements or whatever may make living in the Town more convenient to its People and render it more agreeable to strangers, resorting thither for Health or a temporary residence," and particularly the words "lay out," and with particular reference to the question whether the person

* See *Higginson* v. *Turner*, 171 Mass. 586.

† In *Madden* v. *Boston*, 177 Mass. 350, the court did not find it necessary to pass upon the question whether the persons assuming to act as managers of the Franklin fund lawfully were entitled to act as such managers.

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or persons who the court decides are now authorized to lay out the fund have the right to do it in such manner or form or for such purpose as will impose a substantial and continuing expense upon the taxpayers of the city of Boston for the maintenance of the particular object upon which the fund is laid out.

Fifth. Whether, assuming that the defendant aldermen and clergymen, or some of them, are the managers of the fund, or have some power or authority with reference to the disposition of it, these managers can dispose of or lay out the fund by anything less than a unanimous vote.

With an additional prayer, that if the court should deem that the defendant aldermen and clergymen are not the managers of the fund, the court will appoint some suitable person or persons, either private persons or officials of government, as to the court may seem best, to act as managers under the terms of the codicil and to carry out the provisions thereof, and, further, that the respondent James H. Doyle and the other ten defendant aldermen who voted affirmatively on the vote of May 21, 1902, may be enjoined from purchasing the land mentioned in that vote or any other land or doing anything concerning the laying out or expenditure of any part of the Franklin fund until further order of this court, and for further relief.

The votes of May 21, 1902, were as follows: (1) "That James H. Doyle be authorized in behalf of the Managers of the Franklin Fund to purchase on terms stated in the offer of R. E. Townsend, agent, for a sum not exceeding $146,000, 96,000 square feet of land, more or less, situated in Boston, on Washington and Townsend streets, said land having been offered for sale to said managers by said Townsend, and said site having been selected by the vote of said managers, at the meeting of said managers, held May 21, 1902," and (2) "That said Doyle be hereby authorized to make the necessary draft on the City Treasurer for the purchase of said land, according to the terms of said offer." These two votes were passed in pursuance of a vote of April 17, 1902, declaring the purpose of the board of managers or trustees to lay out a portion of the fund to be used for the erection of a building for the promotion of education in the respects mentioned in that vote. On the votes of May 21, 1902, eleven persons voted in the affirmative, to wit, the defend-

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ants Doyle, Kelley, Quigley, Lomasney, Bowen, Norris, Dowd, Miller, McCarthy, Farwell and Heath, and four persons voted in the negative, to wit, the defendants Tinkham, Slattery, Duane and MacLennan. The defendant Eells was not present.

The codicil of the will of Benjamin Franklin, dated June 23, 1789, and proved April 23, 1790, contained the following:

"I have considered that among Artisans good Apprentices are most likely to make good Citizens, and having myself been bred to a manual Art Printing, in my native Town, and afterwards assisted to set up my business in Philadelphia by kind loan of Money from two Friends there, which was the foundation of my Fortune, and of all the utility in life that may be ascribed to me, I wish to be useful even after my Death, if possible, in forming and advancing other young men that may be serviceable to their Country in both those Towns.

"To this End I devote Two thousand Pounds Sterling, which I give, one thousand thereof to the Inhabitants of the Town of Boston, in Massachusetts, and the other thousand to the Inhabitants of the City of Philadelphia, in Trust to and for the Uses, Interests and Purposes hereinafter mentioned and declared.

"The said sum of One thousand Pounds Sterling, if accepted by the Inhabitants of the Town of Boston, shall be managed under the direction of the Select Men, united with the Ministers of the oldest Episcopalian, Congregational and Presbyterian Churches in that Town; who are to let out the same upon Interest at five per cent per Annum to such young married artificers, under the Age of twenty-five years, as have served an Apprenticeship in the said Town; and faithfully fulfilled the Duties required in their Indentures, so as to obtain a good moral Character from at least two respectable Citizens, who are willing to become their Sureties in a Bond with the Applicants for the Repayment of the Monies so lent with Interest according to the Terms hereinafter prescribed. All which Bonds are to be taken for spanish milled Dollars or the value thereof in current Gold Coin. And the Managers shall keep a bound Book or Books wherein shall be entered the Names of those who shall apply and receive the benefit of this Institution and of their Sureties, together with the Sums lent, the Dates and other necessary and proper Records, respecting the Business and Concerns of this

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Institution. And as these Loans are intended to assist young married Artificers in setting up their Business, they are to be proportioned by the discretion of the Managers, so as not to exceed Sixty Pounds Sterling to one Person, nor to be less than Fifteen Pounds. And if the numbers of Appliers so entitled shall be so large, as that the sum will not suffice to afford to each as much as might otherwise not be improper, the proportion to each shall be diminished so as to afford to every one some Assistance. These aids may therefore be small at first; but as the Capital increases by the accumulated Interest, they will be more ample. And in order to serve as many as possible in their Turn, as well as to make the Repayment of the principal borrowed more easy, each Borrower shall be obliged to pay with the yearly Interest, one tenth part of the principal, which Sums of Principal and Interest so paid in, shall be again let out to fresh Borrowers. And as it is presumed that there will always be found in Boston virtuous and benevolent Citizens willing to bestow a part of their Time in doing good to the rising Generation by Superintending and managing this Institution gratis, it is hoped that no part of the Money will at any time lie dead or be diverted to other purposes, but be continually augmenting by the Interest, in which case there may in time be more than the occasions in Boston shall require and then some may be spared to their Neighboring or other Towns in the said State of Massachusetts who may desire to have it, such Towns engaging to pay punctually the Interest and the Portions of the principal annually to the Inhabitants of the Town of Boston.

"If this Plan is executed and succeeds as projected without interruption for one hundred Years, the Sum will then be one hundred and thirty-one thousand Pounds of which I would have the Managers of the Donation to the Town of Boston, then lay out at their discretion one hundred thousand Pounds in Public Works which may be judged of most general utility to the Inhabitants such as Fortifications, Bridges, Aqueducts, Public Building, Baths, Pavements or whatever may make living in the Town more convenient to its People and render it more agreeable to strangers, resorting thither for Health or a temporary residence. The remaining thirty-one thousand Pounds, I would have continued to be let out on Interest in the manner above

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directed for another hundred Years, as I hope it will have been found that the Institution has had a good effect on the conduct of Youth, and been of Service to many worthy Characters and useful Citizens. At the end of this second Term, if no unfortunate accident has prevented the operation the sum will be Four Millions and Sixty one thousand Pounds Sterling, of which I leave one Million sixty one Thousand Pounds to the Disposition of the Inhabitants of the Town of Boston and Three Millions to the disposition of the Government of the State, not presuming to carry my views farther.

"All the directions herein given respecting the Disposition and Management of the Donation to the inhabitants of Boston, I would have observed respecting that to the Inhabitants of Philadelphia: only as Philadelphia is incorporated, I request the Corporation of that City to undertake the Management agreeable to the said Directions and I do hereby vest them with full and ample Powers for that purpose; and having considered that the covering its Grand Plat with Buildings and Pavements, which carry off most of the Rain and prevent its soaking into the Earth and renewing and purefying the Springs, whence the Water of the Wells must gradually grow worse, and in time be unfit for use, as I find has happened in all old Cities, I recommend that at the end of the first hundred Years, if not done before, the Corporation of the City employ apart of the Hundred thousand Pounds in bringing by Pipes the Water of Wissahickon Creek into the Town, so as to supply the Inhabitants which I apprehend may be done without great difficulty, the level of that Creek being much above that of the City and may be made higher, by a Dam, I also recommend making the Schuylkill compleately navigable. At the end of the Second Hundred Years, I would have the disposition of the Four Million and Sixty one thousand Pounds divided between the Inhabitants of the City of Philadelphia and the Government of Pennsylvania, in the same manner as herein directed with respect to that of the Inhabitants of Boston and the Government of Massachusetts.

"It is my desire that this Institution should take place and begin to operate within one year after my decease; for which purpose due Notice should be publickly given previous to the expiration of that Year, that those for whose Benefit this estab-

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lishment is intended may make their respective applications; And I hereby direct my Executors, the survivors or survivor of them, within six Months after my decease, to pay over the said Sum of Two thousand Pounds Sterling, to such Persons as shall be duly appointed by the Select Men of Boston and the Corporation of Philadelphia, to receive and take charge of their respective Sums of One thousand Pounds each, for the Purposes aforesaid.

"Considering the accidents to which all human Affairs and Projects are subject in such a length of Time, I have perhaps too much flattered myself with a vain Fancy, that these Dispositions, if carried into execution, will be continued without interruption, and have the Effects proposed. I hope, however, that if the Inhabitants of the two Cities should not think fit to undertake the execution they will at least accept the offer of these Donations as a Mark of my good-Will, a token of my Gratitude and a Testimony of my earnest desire to be useful to them even after my departure. I wish indeed that they may both undertake to endeavour the Execution of the Project: because I think that tho' unforseen Difficulties may arise, expedience will be found to remove them, and the Scheme be found practicable: If one of them accepts the Money with the Conditions and the other refuses: my Will then is that both Sums be given to the Inhabitants of the City accepting the whole: to be applied to the same purposes and under the same Regulations directed for the separate Parts: and if both refuse, the Money of course remains in the Mass of my Estate and is to be disposed of therewith according to my Will made the seventeenth day of July 1788."

The allegations of the bill in regard to Christ Church and the First Church in Boston are stated in the opinion. It also was alleged in the bill that the First United Presbyterian Church, of which Mr. MacLennan is the minister, was established in 1847 and was and is the oldest Presbyterian church in Boston, and that from the death of Benjamin Franklin until the establishment of the First United Presbyterian Church there was no Presbyterian church in Boston.

The case came on to be heard before *Loring*, J., who, by agreement of all parties desiring to be heard, reserved it upon

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the bill and answers, and the disclaimer of the defendant Gordon, for determination by the full court.

T. M. Babson, for the plaintiff.

N. Matthews, Jr., *W. G. Thompson & S. R. Spring*, for the defendant Doyle and others, eleven of the aldermen of the city of Boston.

A. Boyden, *E. C. Bradlee & H. Twombly*, for the defendant Eells.

F. N. Nash, Assistant Attorney General, for the Attorney General.

KNOWLTON, C. J. The legacy to the inhabitants of the town of Boston, given in the codicil of the will of Benjamin Franklin, with the provision for the disposition and management of it, constitutes a public charity. It was the intention of the testator that, within a year after his death, benefits should begin to accrue from it to a large class of worthy young men in Boston, through the creation of a fund from which they could borrow on easy terms small sums for their advancement. He provided that at the expiration of one hundred years a large proportion of the accumulated fund should be expended in building or procuring public works of general utility which should promote the convenience and comfort of the people of Boston or of others temporarily abiding there. He provided for the investment and accumulation of the balance for one hundred years more, at the end of which period a part of it is to be subject to the disposition of the people of Boston and a part to the disposition of the government of the State. The plan was stated by the testator with considerable elaboration, and the method of carrying it into effect appears in the codicil. This is by a board of managers to consist of the selectmen of the town, and the ministers of the oldest Episcopalian, Congregational and Presbyterian churches in the town. The gift was in such a form as to raise a question whether the legal title to the fund was in the inhabitants of Boston or in the managers. Similar questions arose in *Drury* v. *Natick*, 10 Allen, 169, and *Cary Library* v. *Bliss*, 151 Mass. 364. In the first of these cases it was held that the legal title was in the town, while the entire management of the property was in a board of trustees provided by the will. In the other case it was said in the opinion that the legal title to the fund was in the

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trustees, and that after the library was established the title to the library was in the town; but in this case, as in *Drury* v. *Natick*, the management of the property both before and after the establishment of the library was in the trustees created by the founder. In regard to the present case it was decided by a majority of this court that the legal title to the fund was in the town of Boston so long as Boston was a town, and is now in the city of Boston. *Higginson* v. *Turner*, 171 Mass. 586. But this decision was not intended to nullify, and could not nullify the provisions of the codicil as to the management of the fund. *Cary Library* v. *Bliss*, 151 Mass. 364. In *Drury* v. *Natick*, *ubi supra*, where the title to the property was in the town, it was said that the authority given to the trustees was "not a mere naked power, but a power coupled with a trust." In *Cary Library* v. *Bliss* the same was held to be true of the power of the trustees after the establishment of the library as the property of the town.

The provisions in regard to the management of the fund were doubtless deemed important by Dr. Franklin, and they must be given effect, so far as possible, according to his purpose and intention. The following language from the opinion in *Cary Library* v. *Bliss* is applicable to the present case: "That part of the donor's scheme which relates to the management and control of the fund and of the library cannot be disregarded as unimportant. It prescribed the method of administering the charity which she thought best adapted to the accomplishment of her purpose. She chose to give her money to be used in that way. She did not authorize the use of it in any other way, unless for some reason it should become impracticable to pursue the course which she prescribed. It is fair to presume that, before founding this charity, she carefully considered the subject of its administration, and thought it wise to select for her board of trustees those officers who have in their special charge the business interests of the town, and those whose duty it is to superintend the education of children, together with such reverend gentlemen as regularly minister in the churches, and are expected earnestly to desire the moral and religious welfare of all the people." It seems plain, therefore, that the board of managers created by the codicil, acting in a fiduciary relation

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under the instrument, are to have the charge and management of the fund, and are to lay out in public works that part of it which is so to be used. See also *Ex parte Blackburne*, 1 J. & W. 297; *Fellows* v. *Miner*, 119 Mass. 541; *Sohier* v. *Burr*, 127 Mass. 221; *Bullard* v. *Chandler*, 149 Mass. 532, 541.

When the town of Boston became a city its board of selectmen went out of existence, and for more than eighty years there has been no such board. At the time of Dr. Franklin's death the selectmen were nine in number, and until the change from a town to a city they constituted a large majority of the managers. This board of managers, as constituted by the testator, ceased to exist in 1822, and only the two clerical members of it remained eligible to continuance in the administration of the trust.

The selectmen while in the performance of their duties as managers were not acting as public officers of the town. They were acting as appointees under the codicil, precisely as the ministers were acting, their only official relation in that field being their relation to the trust. The testator selected his appointees from two classes; and the reference in the will to the public office of the lay members was only a mode of designating the persons appointed to act during their respective terms of office as selectmen. While under the St. 1821, c. 110, the mayor and aldermen became their successors in most particulars as officers of the city, they did not become their successors as managers of the Franklin fund. The will contained no provision in regard to the persons who should act as managers if the office of selectman of Boston should be abolished. But the general purpose of the testator that the fund should be in charge of a board of managers remained unchanged, and in such a case, when it becomes impossible to administer a public charity precisely according to the directions of the founder, it is the duty of a court of equity to carry out his general purpose as nearly as practicable. *American Academy* v. *Harvard College*, 12 Gray, 582. *Weeks* v. *Hobson*, 150 Mass. 377. *Darcy* v. *Kelley*, 153 Mass. 433. *Sears* v. *Chapman*, 158 Mass. 400. *Attorney General* v. *Briggs*, 164 Mass. 561. *Amory* v. *Attorney General*, 179 Mass. 89.

The will being silent as to the persons who are to act as managers with the ministers when there are no longer selectmen,

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it is for a court of equity on application, by virtue of its general jurisdiction over the administration of trusts, to appoint other managers. Without such an appointment no one is legally authorized to act in the place of the selectmen.

For many years the mayor and aldermen, and more lately the aldermen alone, acted as managers with the ministers without objection. It seems that until lately no controversies have arisen, nor any important differences of opinion as to the conduct of the business. It is only since the expiration of the first hundred years, when it is time to lay out money in public works, that it becomes important to look sharply at the legal rights of the persons assuming to act as managers.

From what we have already said it appears that, in the absence of any appointment by a court, no person succeeded to the powers and rights of the selectmen in the execution of this trust. Long acquiescence by the clerical managers and others, in the action of members of the board of aldermen, does not give members of that board a right to act in the disposition of this fund. It follows that the votes of May 21, 1902, passed by the affirmative action of eleven persons, all of whom were members of the board of aldermen, against the negative vote of two ministers, members of the board of managers, and two persons who were members of the board of aldermen, were without legal authority and void.

We are asked for instructions upon the question whether the defendants Mr. Eells, Mr. Duane, and Mr. MacLennan, are authorized to act as managers under the codicil. Upon the facts stated this question should be answered in the affirmative as to each of them. The persons designated in this part of the will are "the Ministers of the oldest Episcopalian, Congregational and Presbyterian Churches in that Town." This means three ministers in all, representing the three denominations mentioned, each one representing the oldest church of his denomination in Boston. There seems to be little if any real dispute upon this part of the case. Upon the facts stated we are of opinion that King's Chapel ceased to be an Episcopalian church within the meaning of the term used by the testator, and that Christ Church is the oldest Episcopalian church in Boston. The Reverend Doctor George A. Gordon, pastor of the Old South Congrega-

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tional Church, averring that he was made a defendant against his will, declares that the church of which he is pastor is not the oldest Congregational church in Boston within the meaning of the words in the codicil, and disclaims any rights or interest in these proceedings, and in the matter to which they relate. The bill states that at the time of Dr. Franklin's death the church of which Mr. Eells is the pastor was the oldest Congregational church in Boston. It further states that the minister, and probably a majority of the members of this church, then entertained opinions about the doctrine of the Trinity and other matters of dogma which were substantially the same as the opinions which later became known under the distinctive name of Unitarian, in contradistinction to Congregational, or Orthodox Congregational. It is stated that the line of demarcation between these two branches of the Congregational church was distinctly drawn about the year 1815. Both branches of the church have continued Congregational in government since that date, and many, if not most of the churches in whose name the word "Congregational" appears, even if Unitarian in doctrine, have retained their name unchanged. The leading American lexicographers make the primary meaning of the word "Congregational" pertain to church government, although a secondary and popular meaning relates to doctrine. Doubtless many of the ministers and people of so-called Orthodox Congregational churches entertain doctrinal opinions very different from those most prevalent in the same churches one hundred years ago. We are of opinion that the testator, in using this word, did not have in mind any nice shades of distinction in regard to the doctrine of the Trinity, or other kindred doctrines, but that he meant to include churches of a kind well known in Boston and elsewhere in Massachusetts, which were not exactly alike in their doctrines, but which, chiefly by reason of their polity, were called Congregational. The case does not show that the so-called "First Church in Boston" has ceased to be a Congregational church within the meaning of the will.

The Supreme Court of New Hampshire in *The Dublin case*, 38 N. H. 459, gave an elaborate decision which fully covers the question before us, and which is in accordance with the view we have stated. Decisions in this Commonwealth recognize the

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distinguishing features of Congregational churches. *Baker* v. *Fales*, 16 Mass. 488, 515. *Weld* v. *May*, 9 Cush. 181, 184. *Attorney General* v. *Federal Street Meeting-house*, 3 Gray, 1, 57.

The words "lay out" mean something more than the adoption of a plan for the use of the money in the way directed. They include the actual expenditure of it in the establishment of public works of the kind described, all of which is to be done by the board of managers.

It hardly could be contended that this board could compel the city of Boston to assume any burden of maintenance or otherwise, involving the use of money to be raised by taxation, whatever the city might do voluntarily under the authority of law. In view of our decision in regard to the invalidity of the votes, we do not deem it necessary to consider questions as to the details of the particular expenditure to which the votes relate.

The duties of the managers are not of a kind which require a unanimous vote of the board as a foundation for action. The concurrence of a majority is sufficient to authorize proper proceedings. This board is similar to a board of public officers, or a committee appointed by a public body to perform public duties. Such a board or committee may always act by a majority. *Damon* v. *Granby*, 2 Pick. 345. *Williams* v. *Lunenburg School District*, 21 Pick. 75. *Weymouth & Braintree Fire District* v. *County Commissioners*, 108 Mass. 142. It is a board appointed to act in a fiduciary capacity in the administration of the affairs of a public charity. A distinction is made between private agents, or agents or trustees of a private trust, and trustees managing business of a public charity like that intrusted to this board. In the performance of duties of this latter kind, a board may act by a majority. *Morville* v. *Fowle*, 144 Mass. 109, 113. *Ward* v. *Hipwell*, 3 Giff. 547. *The King* v. *Beeston*, 3 T. R. 592. *Withnell* v. *Gartham*, 6 T. R. 388.

The final prayer of the bill for special relief is, that if the court takes the view of the law which we have taken, it will appoint some suitable person or persons to act as managers under the terms of the codicil, and will enjoin the defendant Doyle and the other ten defendant aldermen who acted affirmatively in the votes of May 21, 1902, from purchasing the land mentioned

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in the vote, and from doing anything concerning the laying out or expenditure of any part of the Franklin fund.

We are of opinion that this prayer should be granted. Before appointing managers to act in the place of the selectmen, it is necessary to ascertain as nearly as possible the general purpose of the testator in selecting his board. Looking at the designation of persons who were to constitute from time to time the lay members of the board, and also at the designation of clerical members, it seems that they were chosen, not for any particular official qualification, or for the possession of any particular doctrinal opinions, but with a view to their representative character, as men together combining the best general qualifications for the administration of such a trust. When the codicil was made the three religious denominations mentioned in it were leading denominations in this part of the United States, and the ministers in charge of leading churches of these denominations held a high place for influence in the community, not only in religious affairs, but in educational, charitable and social matters. Boston was a town of a very small population in comparison with the present population of the city, and the nine persons chosen for selectmen would naturally represent a considerable proportion of the intelligence, integrity, strength and business ability of the town at that time. In a city of the size of Boston to-day, such a board necessarily includes only a comparatively small proportional part of the whole number of able and excellent men who would be willing to serve without pay in charitable work. If there were any peculiar duties pertaining to the official station of the selectmen which were considered by the testator as indicating fitness for service as managers, doubtless they were the important executive and administrative duties performed by these town officers. By the original city charter of Boston (St. 1821, c. 110) these duties were imposed upon the mayor and aldermen, and by the amendatory statute of 1854, c. 448, most of them were left to be performed by the board of aldermen alone, of which the mayor was no longer to be a member. By the later statute of 1885, c. 266, § 6, the Legislature took from the board of aldermen all its executive power and conferred it upon the mayor, and by § 12 forbade action by the board in any administrative or executive business

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of the city, putting all this power into the hands of the mayor and certain boards in charge of special departments. So far as the exercise of executive and administrative functions by the selectmen was evidence of their qualifications and a reason for their appointment as managers of this charity, the reason is not applicable to the aldermen of Boston under existing laws. The mayor is the official representative of executive power in the city, and if the performance of executive duties in the city government should be considered in the selection of the managers of this charity, he is the only officer of distinction in this department. In regard to the administration of the charity the testator said in the codicil, "It is presumed that there will always be found in Boston virtuous and benevolent Citizens willing to bestow a part of their Time in doing good to the rising Generation by Superintending and managing this Institution gratis," etc. We are of opinion that managers should be appointed by the court from this class of citizens, chosen by reason of their qualifications, intellectual and moral, for this important service. We deem it proper that the mayor *ex officio* should be a member of the board, and that the whole number of lay members to act with the clerical members should be the same as the number of selectmen at the time of Dr. Franklin's death.

The provisions of the R. L. c. 149, § 1, in relation to the giving of bond by trustees appointed by the Probate Court under a will, are not applicable to these managers. *Drury* v. *Natick*, 10 Allen, 169, 176. *Lowell, appellant*, 22 Pick. 215. The case is to be heard before a single justice of this court, for the appointment of nine managers, of whom the mayor of the city shall be one, to act with the ministers in accordance with this opinion, and an injunction is to be issued as prayed for.

So ordered.

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LUCIUS D. HAZEN *vs.* ESTELLE V. MATHEWS.

Hampden. October 21, 1903. — November 25, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Evidence, Proof of foreign law. *Easement*, Equitable restriction.

In the absence of evidence on the subject, it will be presumed that the law of the State of New York as to equitable restrictions on land is the same as the common law of this Commonwealth.

An equitable restriction imposed by a deed cannot enure to the benefit of unrestricted land owned in common by the grantor and another not a party to the deed.

CONTRACT for alleged breach of a covenant against incumbrances in a deed from the defendant to the plaintiff dated August 8, 1897, conveying a lot numbered 91 on a certain plan, dated November 5, 1868, of land at Chester Hill, a portion of Mount Vernon, in the State of New York. Writ dated May 14, 1900.

At the trial in the Superior Court *Mason*, C. J. at the close of the plaintiff's case ordered a verdict for the defendant; and the plaintiff alleged exceptions.

It appeared at the trial, that the southerly line of Mount Vernon is the northerly line of the city of New York, that Mount Vernon is about thirteen miles and a fraction from the Grand Central station and is almost entirely a residential city of detached houses, a suburb of New York; that Chester Hill is the chief residence portion of Mount Vernon, having the best buildings and high priced lots; that Mount Vernon had at the time of the trial about twenty-five thousand inhabitants, and that the population in 1897 was probably about eighteen or nineteen thousand. On page 389 is a reduced copy of the plan of November 5, 1868, omitting the dimensions of the lots, and on page 390 is a sketch showing the situation and surroundings of lot 91 on a larger scale.

W. H. Brooks & W. Hamilton, for the plaintiff.

T. W. Kenefick, J. B. Carroll & W. H. McClintock, for the defendant.

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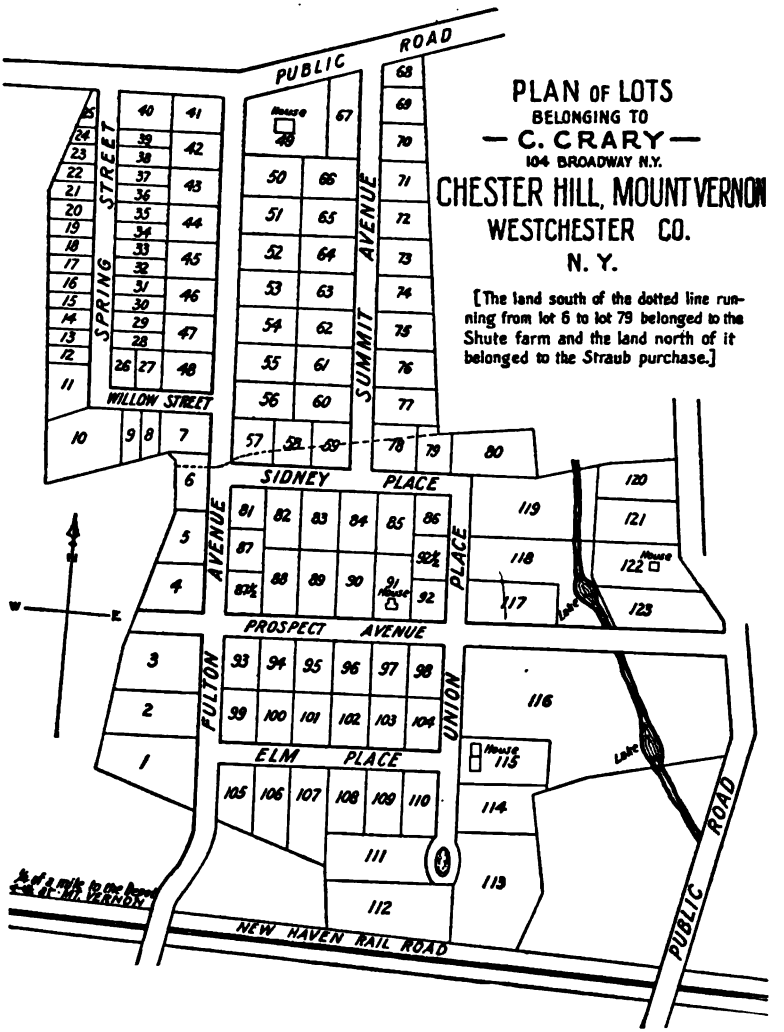
LORING, J. In 1866, one Crary bought of Gilbert and Peter Shute a farm containing some fifty-one acres; and at some time not stated in the bill of exceptions he purchased another tract lying north of the Shute farm, "known as the Straub purchase."



On November 5, 1868, he filed in the office of the Register of Westchester County the accompanying plan, in which both parcels are laid out in building lots fronting on streets shown on the plan. On July 27, 1868, he sold to one McDougal lots 96 and

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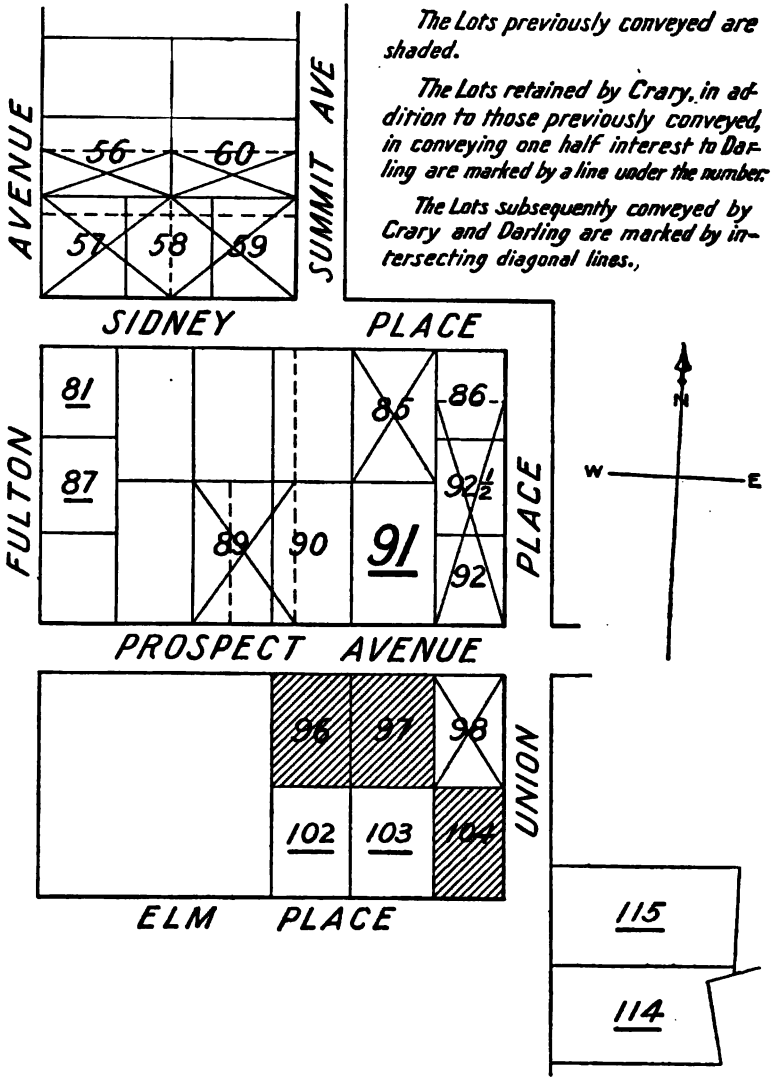
104, and to one Komp lot 97, referring to a map to be recorded, and they are shown on the plan recorded in the succeeding November mentioned above.

On March 1, 1869, he conveyed to one Darling an undivided



half interest in all the tract shown on the plan, that is to say, an undivided half of the Shute purchase and the Straub purchase, excepting lots 96, 97 and 104, which had been previously con-

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veyed away by him, and also lots 81, 87, 91, 102, 103, 114 and 115, which had not been conveyed. All of these lots were originally part of the Shute purchase. Crary also excepted a part of the Straub purchase, being the land included in lot 49 and a portion of lot 67 on said plan.

On March 20, 1869, he sold to one Wooster lot 91, which had been excepted from the conveyance to Darling. That lot was conveyed by Wooster to the defendant and by the defendant to the plaintiff; and in the conveyance to the plaintiff the defendant covenanted that she owned the lot free from incumbrances.

The plaintiff's contention is that by the deed from Crary to Wooster, lot 91 became subject to an incumbrance by way of equitable restriction, and this action was brought to recover from the defendant the difference between the market value of lot 91 free from incumbrances and its value subject to the equitable restriction in question.

No evidence was introduced at the trial of the fact that by the law of New York the deed from Crary to Wooster created an equitable restriction, nor of what the law of New York on that subject is. In the absence of such evidence, the case must be disposed of on the presumption that the law of New York in this respect is the same as the common law of this Commonwealth.

On April 30, 1869, two months after the conveyance of the undivided half of substantially the whole tract to Darling, and one month after the conveyance to Wooster, a plan was filed in the Register's office for Westchester County, covering the tract of land covered by the former plan and another tract of land equally large. On this second plan Summit Avenue was cut through from Sidney Place, called on the new plan Sidney Avenue, to Prospect Avenue; otherwise the lay out of the land was substantially the same. There were changes in the division of the land into lots within the side lines of the streets, which do not seem to be material in this case.

It was provided in the deed from Crary to Wooster, among other things, that neither the grantee nor his heirs or assigns should at any time thereafter erect a dwelling or other building within fifty feet of the front line of said lot. The plan referred to in the deed is the first plan on which Summit Avenue stops at

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Sidney Place and is not represented as going through to Prospect Avenue as it did on the second plan. The front line of the lot is the line of Prospect Avenue.

In June, 1874, Crary and Darling conveyed to Wooster a small triangular piece of land formerly part of lot 90, left on the east side of Summit Avenue and abutting on the upper side of lot 91; and Wooster conveyed to Crary and Darling a small triangular lot taken from the lower end of 91, which was within the side line of Summit Avenue. There was an attempt made at this time to impose restrictions on that portion of lot 91 which fronts on Summit Avenue, but no claim for damages by reason of that is made here, and it may be disregarded.

The plaintiff's contention is that an incumbrance by way of equitable restriction was imposed on lot 91 by the deed to Wooster taken in connection with the deeds to McDougal and Komp, made before the first plan was recorded, in connection with the two plans, and also in connection with subsequent deeds of certain lots which were excluded by the judge. The subsequent deeds covered the lots lying next on the east and north of lot 91, the lot in question, and those to the west on the other side of the extension of Summit Avenue, and also lot 257 on the second plan* (formerly 98), and lots 220, 221, 219 and 222 (formerly 57, 58, 59 and part of 56 and 60).

The prior deeds to McDougal and Komp contained a clause beginning with these words: "subject, nevertheless, to the following restrictions, subject to which this conveyance is made and accepted by the party of the second part, that is to say, That neither the party of the second part, his heirs or assigns," shall in substance (1) permit any noxious trades on the premises conveyed; (2) or erect any buildings except dwellings; or (3) any dwelling house costing less than $2,500; or (4) erect any dwelling or other building within thirty feet of the front lines of said lots; or (5) any stable or other buildings within seventy-five feet of those lines.

The restrictions in the deed of lot 91 were the same with two exceptions; in addition to noxious trades it prohibited "any store or place for the sale of beer or liquors, or other store

* The second plan is not reproduced in this report. It is described in the fourth paragraph on page 391.

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whatever"; and the buildings to be erected for dwellings were to be set back fifty in place of thirty feet from the front line of the lot.

In the subsequent deeds made by Darling and Crary which were excluded, the restrictions seem to be the same as in the deeds to McDougal and Komp, made before lot 91 was conveyed to Wooster.

The plaintiff contends that subsequent deeds are admissible in evidence to prove that there was a general scheme in pursuance of which his deed was made, that the deeds and plans show that there was such a scheme in the case of this land, and that the two matters in which the restrictions in the deed in question differ from those in the prior and subsequent deeds are not so important as to take lot 91 out of the scheme. On the last point he relies on *Hano* v. *Bigelow*, 155 Mass. 341, *Hills* v. *Metzenroth*, 173 Mass. 423, and *Bacon* v. *Sandberg*, 179 Mass. 396.

All that had taken place when lot 91 was conveyed to Wooster were the conveyances to McDougal and Komp of lots 96, 97 and 104, the filing of the first plan and a conveyance to Darling of an undivided half interest, free from any restrictions, of the original tract shown on the first plan, with the exception of the three lots previously conveyed and of lot 91 and of six other lots, none of which are in the immediate neighborhood of lot 91.

Had Crary inserted a clause in his deed of lot 91 stating that an easement was imposed on lot 91 for the benefit of and as appurtenant to the lots on the same side of Prospect Avenue and the other lots in that neighborhood belonging to himself and Darling, the clause would not have been effectual. An easement cannot be imposed by deed in favor of one who is a stranger to it. *Edwards Hall Co.* v. *Dresser*, 168 Mass. 136.* Darling, who owned one half of the adjoining land free from any restriction, was a stranger to the deed of lot 91 made by Crary to Wooster. An easement cannot be attached to land owned by two tenants in common by a conveyance to which only one of them is a party. We are of opinion that a similar rule applies here, and that the covenant which it is contended creates an equitable restriction is personal to the grantor and grantee,

* See *Haverhill Savings Bank* v. *Griffin*, *post*, 419.

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and does not enure to the benefit of subsequent owners of the land.

In the case at bar it appeared that Crary is dead. The restrictions contained in the deed of lot 91 are at an end, and the presiding judge was right in excluding the subsequent deeds and in directing a verdict for the defendant.

In stating the principle of equitable restrictions in *Whitney* v. *Union Railway*, 11 Gray, 359, 365, Bigelow, J. confines the doctrine to a case where it was the intention to create one "for the benefit of other land owned by the grantor, and originally forming with the land conveyed one parcel."

Exceptions overruled.

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ELLEN N. SMITH *vs.* AMOZ SMITH.

Dukes County. October 26, 1903. — November 25, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Superior Court. Jurisdiction. Husband and Wife. Practice, Civil, Appeal.

Although after an appeal from a decree of the Probate Court, under Pub. Sts. c. 147, § 33, ordering a husband to provide separate maintenance for his wife, the case is still pending in the Probate Court for such further proceedings as may become necessary, yet if the Superior Court on such an appeal orders certain monthly payments to be made by the husband "to continue until the further order of this court," the Superior Court retains jurisdiction to enforce its decree by contempt proceedings.

PETITION, filed April 24, 1900, in the Superior Court for Dukes County, praying that the respondent be adjudged in contempt, for failure to comply with a decree entered in that court ordering the respondent to pay the petitioner $10 a week in monthly payments.

The respondent filed a motion that the petition be dismissed for want of jurisdiction.

In the Superior Court *Aiken*, J. denied the motion to dismiss, and adjudged the respondent to be in contempt. He made an order that the respondent pay to the petitioner the sum of $4,460, or that on his neglect or refusal to do so he be commit-

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ted to the jail at Edgartown, there to remain until he should comply with the decree. Being of the opinion that these interlocutory orders made by him ought to be passed upon by this court before any further proceedings in the trial court, the judge reported the case for such determination. If the action of the judge was right, the decree ordered by him to be entered was to be affirmed; otherwise the petition for contempt was to be dismissed.

R. F. Raymond, for the respondent.

W. H. Powers, for the petitioner.

KNOWLTON, C. J. The question in this case is whether the enforcement of obedience to a decree of the Superior Court ordering payments of money under the Pub. Sts. c. 147, § 33, should be by proceedings in the Superior Court, or by proceedings in the Probate Court in which the case was begun, and from which it was carried by appeal to the Superior Court. This kind of relief, for married women needing support and living apart from their husbands for justifiable cause, was first obtained under the St. 1874, c. 205, through proceedings brought in the Supreme Judicial Court, and then, by the St. 1880, c. 64, this jurisdiction was transferred to the Probate Court, (see Pub. Sts. c. 147, § 33,) with a right in either party to appeal to the Supreme Judicial Court under the provisions which were embodied in the Pub. Sts. c. 156, §§ 12, 13, 17, and which now appear with amendments in the R. L. c. 162, §§ 9, 16, 18, 19, 23. By the St. 1887, c. 332, this appellate jurisdiction, with jurisdiction in other kindred matters, was transferred from the Supreme Judicial Court to the Superior Court, with the provision that "all proceedings on such appeals shall be the same, so far as practicable, as are now provided by law on like appeals to the Supreme Judicial Court." The St. 1888, c. 290, is "An Act relating to appeals from Probate Courts," which, by the St. 1890, c. 261, is made to apply to these appeals to the Superior Court, as well as to appeals to the Supreme Judicial Court. So far as pertains to the questions arising in this case, it was probably applicable without such express provision. The question before us is, therefore, to be decided under the rules of law applicable to appeals from the Probate Court to the Supreme Judical Court, as stated in the Pub. Sts. c. 156, §§ 12, 13, 17, and amendments thereto.

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The nature and effect of appeals from the Probate Court to the Supreme Judicial Court were considered in *Dunham* v. *Dunham*, 16 Gray, 577, and more fully in *Gale* v. *Nickerson*, 144 Mass. 415. In the latter case Chief Justice Morton, referring first to appeals under the old practice from the Court of Common Pleas to the Supreme Judicial Court, by which the whole case was taken out of the jurisdiction of the lower court, and referring then to cases transferred by appeal, or by exceptions, or by report from the Superior Court to the Supreme Judicial Court for the determination of questions of law, said in the opinion, "A probate appeal lies between these two classes of cases. It does not bring the cause to the Supreme Court of Probate; that remains within the jurisdiction of the Probate Court; it does more than to bring here the question of law ruled on by the Probate Court; it brings the whole question, including both law and fact, whether the decree appealed from is invalid for any of the reasons of appeal assigned by the appellant." After a decision by the Supreme Court of Probate, a copy of the record of the order or decree should be certified by the clerk and transmitted to the Probate Court, where it has effect for all proper purposes in the cause as if originally made in the Probate Court. In the language of Mr. Justice Metcalf in *Dunham* v. *Dunham*, 16 Gray, 577, 578, "The judgment of the appellate court has been, and still is, only upon the order, etc., from which the appeal is taken, and has been and still is certified to the Probate Court, where further proceedings are had, or are stopped, as if the decision had been made by that court. The appeal gives no jurisdiction to the appellate court to proceed in the settlement of an estate, but only to reconsider the order, etc., appealed from; and its judgment is to be carried into effect by the Probate Court, whose jurisdiction over the cause and the parties is not taken away by the appeal." See *Choate* v. *Jacobs*, 136 Mass. 297, 298. In each of these cases from which we have quoted, the original proceeding was a petition for the probate of a will, and on granting the petition, the case remained in the Probate Court for further action by the petitioner and the court in the settlement of the estate. We can conceive of cases in which the appeal would take to the appellate court every question that could ever arise in the case, and in which the decision upon the appeal would

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necessarily be a final disposition of the case in every possible aspect of it. In such cases the execution of the decree by processes from the appellate court, if such execution were needed, might be convenient and proper, and there would be no need of treating the case as longer pending in the Probate Court. If probate appeals generally were of this kind, doubtless they would be treated as removing the case for all purposes to the appellate court, as appeals from the Court of Common Pleas to the Supreme Judicial Court, under the old practice, took away jurisdiction from the lower court. Because they are generally of a different kind, the cases are treated as still pending in the Probate Court, although so far as they are affected by the appeal, they are taken to the appellate court.

The statute gives the appellate court great latitude in regard to the course of the proceedings and the form of the decision on the appeal. "The supreme court of probate may reverse or affirm, in whole or in part, the decree or order appealed from, and may pass such decree thereon as the probate court or the judge thereof ought to have passed, may remit the case for further proceedings, or take any other order therein, as law and justice may require." Pub. Sts. c. 156, § 17. (R. L. c. 162, § 23.) The appeal in this case brought up for revision everything in the case which was open for immediate consideration, namely, the questions whether the petitioner was living apart from her husband for justifiable cause, whether the husband should be prohibited from imposing any restraint on her personal liberty, and what order if any should be made concerning her support, and the care, custody and maintenance of the minor children. Pub. Sts. c. 147, § 33. (R. L. c. 153, § 33.) Under this section the court "may, from time to time, afterwards, on a similar application, revise and alter such order, or make a new order or decree, as the circumstances of the parents or the benefit of the children may require." We think that this contemplates the continued pendency of the case in the Probate Court after the entry of a decree, for an application by either party in the case, without filing a new petition. This view is strengthened by the fact that the court has no power to order support by the appellant by the payment of a gross sum, but only by payments from time to time. *Doole* v. *Doole*, 144 Mass. 278. But the

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appellate court may make any proper order or decree covering conditions then existing to which the appeal relates. The court made such a decree in this case, and, in reference to the monthly payments, decreed that they were "to continue until the further order of this court." If for the words "this court" the words "Probate Court" had been substituted, they would have conformed exactly to the statute. We have no doubt that the decree might have provided expressly for its own enforcement by execution to be issued by the Probate Court, or by other proceedings in that court, and if it had made such a provision, the decree in that part, upon certification to the Probate Court, would have been in effect there as if originally made there, and that court could have issued its execution for the enforcement of it. So also, wilful disobedience of a decree in effect there, which by its express provisions it was the duty of that court to enforce, would have been a contempt of that court punishable there; but as to all matters within the jurisdiction of the Supreme Court, which included the determination of the rights of the parties under conditions then existing, and an enforcement of the decision, we have no doubt of the power of the Superior Court to enforce its own decree instead of providing for the enforcement of it in the Probate Court. To that extent the case was removed, although it remained in the Probate Court for further applications. The decree made no provision in terms for any action in the Probate Court. It was a decree of the Superior Court, which might be enforced by execution from that court, and wilful disobedience of it would be contempt of that court.

In view of the form of the decree, there having been no application for a modification of it, we are of opinion that the Superior Court may entertain these proceedings for contempt for wilful disobedience of the decree. By the terms of the report the decree ordered by the judge prescribing punishment for contempt is to be entered and affirmed. The issuing of process for commitment will be a supplemental proceeding.

Decree affirmed.

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ESTHER MELLEN *vs.* OLD COLONY STREET RAILWAY COMPANY.

Bristol. October 27, 1903. — November 25, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Negligence, Contributory, of parent, or of person in charge of child.

If a father allows his child three years and eight months of age to go into a yard shut in by a gate which is kept closed by a strong spring, to play with her older sister and a neighbor's daughter each about ten years of age, this is not as matter of law negligence on the part of the father, which will prevent the child from recovering from a street railway company, in an action for injuries from being run over by an electric car after the children had wandered from the yard into the streets.

In an action by a child against a street railway company for injuries from being run over by a car of the defendant, it appeared, that the plaintiff was three years and eight months of age and that a neighbor's daughter ten years of age asked the plaintiff's sister, a few months younger than that, to go to play, whereupon the plaintiff's father said, "You take E. [the plaintiff] with you, . . . and go right in the yard and play", the yard being shut in by a gate which was kept closed by a strong spring. After going into the yard to play, the children wandered off into the streets and the plaintiff was run over by a car of the defendant, when crossing a street on her way home. The defendant contended that there was no evidence of due care on the part of the plaintiff's sister who it contended was in charge of the plaintiff at the time of the accident. *Held*, that whether the plaintiff was under the charge of her older sister after they left the yard was at least a question for the jury, depending upon the nature of the permission given by the plaintiff's father.

TORT by an infant, by her father as her next friend, for personal injuries from being run over by a car of the defendant on Bedford Street in Fall River. Writ dated December 19, 1901.

At the trial in the Superior Court before *Lawton*, J., the jury returned a verdict for the plaintiff in the sum of $5,300; and the defendant alleged exceptions.

The father of the plaintiff was a mill hand. At the time of the accident he was living in a four tenement house on Pine Street in Fall River, the yard of which is described by the court. The accident happened on December 14, 1901, in the manner stated in the opinion. The children having left the yard passed through several streets, and, after looking at the Christmas windows of a department store, were returning when the accident occurred.

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J. M. Swift, for the defendant.

J. W. Cummings & C. R. Cummings, for the plaintiff.

LORING, J. This is a case in which the father of a family of six children allowed the plaintiff, a child of three years and eight months, to go into the yard to play with her older sister aged nine years and nine months, and with the daughter of a neighbor, aged ten. The father lived in a tenement to which was attached a large, roomy yard shut in by a gate which was kept closed by a strong spring. On the day in question he was at home, tapping the shoes of one of the children, and his wife was nursing the baby. After going into the yard to play, the children wandered off into the street and the plaintiff was run over by a car of the defendant while she was crossing Bedford Street on her way home.

The defendant asked the presiding judge to order a verdict for it "on the ground that there was not sufficient evidence to go to the jury of due care on the part of Katie Mellen, [the older sister] the person who the defendant claims had the plaintiff in charge at the time of the accident." This was refused. The case was submitted to the jury under suitable instructions, to which no exception was taken and which are not set forth in the bill of exceptions.

We are of opinion that it was at least a question for the jury whether, in the first place, the father exercised due care in letting the plaintiff play in the yard, and whether, in the second place, the plaintiff was under the charge of her older sister after they left the yard and went upon the street.

Of the first question there can be no doubt. In this case the yard was closed by a gate, and in that respect differs from *Cotter* v. *Lynn & Boston Railroad*, 180 Mass. 145, and comes within *Powers* v. *Quincy & Boston Street Railway*, 163 Mass. 5. In addition, the plaintiff was put under the charge of her older sister while playing in the yard, and so the case is within cases like *Mulligan* v. *Curtis*, 100 Mass. 512, and *Collins* v. *South Boston Railroad*, 142 Mass. 301.

The father testified that when the neighbor's daughter came in and asked the older sister to go and play, he said, "You take Essie [the plaintiff] with you, . . . and go right in the yard and play." When the three children left the yard, it was at least a

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question for the jury whether the plaintiff continued to be under the charge of her older sister or was in the position of a child who has got out on the street without fault on the part of its parents and whose rights depend upon the exercise by it of that care which may reasonably be expected from children of its age, as in *Slattery* v. *O'Connell*, 153 Mass. 94; *Butler* v. *New York, New Haven, & Hartford Railroad*, 177 Mass. 191; *O'Brien* v. *Hudner*, 182 Mass. 381.

Whether the plaintiff continued to be under the charge of her sister when the children left the yard depends upon this: Did the father put the plaintiff under the charge of the older sister for the afternoon, with an injunction to stay in the yard, or was she allowed to play in the yard under the charge of the older sister? It was at least a question for the jury which was the true nature of the permission that the father gave.

If the plaintiff's rights depended on the exercise by her of the care which may reasonably be expected from a child of her age, there was evidence for the jury that the plaintiff exercised due care.

For these reasons we are of opinion that the plaintiff had a right to go to the jury on this ground, and for that reason the ruling requested was rightly refused.

Exceptions overruled.

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CHARLES P. BRIGHTMAN, executor, *vs.* JOSEPH L. BUFFINGTON, JR. & another, administrators.

Bristol. October 27, 1903. — November 25, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Evidence, Competency.

On the question whether monthly payments made by a son to his mother, for which the mother gave receipts in writing, were payments upon a note of the son held by the mother or were gifts, the son and mother both being deceased at the time of the trial, a witness was allowed to testify without objection that the mother, after the death of the son, refused to accept from the administrator of the son's estate the balance of the note after deducting such payments, on

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the ground that she understood that the payments of the son were gifts to her. *Held*, that although this evidence of the understanding of the mother could not have been admitted if objected to, yet having been admitted without objection it became evidence to be considered by the jury. *In this case*, however, there was independent evidence of declarations of the mother that the money paid by her son was a present, that she had settled with him, and that she was not indebted to him at all.

CONTRACT, by the executor under the will of Rebecca L. Brightman, against the administrators of the estate of Frank W. Brightman, son of Rebecca, on a promissory note given to the mother by the son. Writ dated August 5, 1902.

The answer and declaration in set-off alleged payment of $1,235 as stated by the court.

At the trial in the Superior Court before *Fox*, J., it appeared that Frank W. Brightman was the treasurer of the Stafford Mills in Fall River for a number of years before the time of his death, which occurred on March 1, 1901. His mother, Rebecca L. Brightman, died after a long illness on July 24, 1901, aged seventy-six years. Before his death, and up to the time of his father's death, which occurred on August 27, 1900, Frank W. Brightman, with his brother, the plaintiff, managed the business affairs of his father and mother, who lived in Fall River and possessed each a small estate. He took charge of their money, giving them his personal notes for it, loaned the money, and paid them interest at market rates. He gave two notes to his father, and one of $3,200, dated July 12, 1897, to his mother for money thus taken by him, which was the note declared on. Mrs. Grouard, mentioned by the court, was a sister of the plaintiff's testatrix and was called as a witness by the plaintiff.

The judge refused to give two rulings requested by the defendants which are stated by the court. The jury returned a verdict for the plaintiff in the sum of $3,609.60, the full amount of the note with interest; and the defendants alleged exceptions.

L. E. Wood, for the defendants.

C. R. Cummings, (*J. W. Cummings* with him,) for the plaintiff.

LORING, J. This is an action on a promissory note in the sum of $3,200, made by the defendants' intestate payable to his mother. The only defence set up was payment for all but $1,987, and the facts relied on in support of this defence were also made the subject of a declaration in set-off. In the declara-

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tion in set-off the defendants counted on twenty-three payments of $50 each, for which the defendants produced receipts signed by the mother. These receipts stated in terms or in substance that the money had been received and was to be charged to her account. In addition, the defendants produced receipts, signed by a nurse or nurses who took care of the mother, for $85, the balance of the sum declared on in set-off. The plaintiff's answer to the declaration in set-off was that these sums were paid to the mother by way of a gift. The case is here on two requests for instructions to the jury which were refused. One was a request that there was no evidence warranting a finding that any of the payments stated in the declaration in set-off were intended by the son as a gift, and the other was a request that there was no evidence warranting a finding that any of the payments made after June 27, 1899, that is, any but the first five, were intended by the son as a gift.

It is not necessary to state the case at length, as we are of opinion that there is one piece of evidence which is decisive of both requests. After the son's death, one of his administrators tendered the mother, who was then alive but who died before this action was begun, the balance due on the note now in suit, after deducting the sums set forth in the declaration in set-off. This was refused by her on the ground (so one of the defendants testified) that she understood that the money paid to her by the son who signed the note was a gift to her.

The contention of the administrators of the son is that this evidence as to what the mother understood is not evidence of what the son intended; that the fact that the mother understood that the payments were made by way of gift, does not warrant a finding that the son intended to make them as a gift, and that except for this statement the uncontradicted evidence showed that the intent of the son was to be paid for these advances; that this was known to the mother and could not be defeated by this subsequent statement, made after his death, as to her understanding.

No objection was made to this evidence of what the mother understood and thereby it became evidence, (*Damon* v. *Carrol*, 163 Mass. 404, *Boyle* v. *Columbian Fire Proofing Co.* 182 Mass. 93, *Allen* v. *Fuller*, 182 Mass. 202,) although it was not com-

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petent. If an objection had been made, it could not have been admitted.

But the difficulty with the defendants' argument is that although the testimony of the defendant Buffington was that the mother at that time said that she understood it was a gift, Mrs. Grouard, who was also present, testified that the mother then said that the $1,235 was a present; that she thought she did not owe Frank anything; that she had settled with him. She also testified that a number of times after that the mother said she was not indebted to him at all. However improbable the fact that the son intended these payments to be made by way of gift when other evidence in the case is considered, this testimony gave the jury the right to believe that it was so.

Exceptions overruled.

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ARTHUR S. PHILLIPS & others *vs.* WATUPPA RESERVOIR COMPANY.

Bristol. October 27, 1903. — November 25, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Corporation, Powers. *Deed*, Construction. *Easement*, By prescription. *Evidence*, Best and secondary.

By St. 1826, c. 31, incorporating the Watuppa Reservoir Company, that company was authorized "to make reserves of water in the Watuppa Ponds, so called, by erecting a dam across the outlet of said ponds, in the town of Troy", so as to raise the water in the ponds to a specified height, and to acquire and hold real estate for this purpose, by purchase or otherwise. The company erected a dam in the town of Troy across the Fall River, which is the outlet of the Watuppa Ponds. Some of the land between the dam and the ponds was then in the State of Rhode Island, and the corporation by deed and prescription claimed the right to flow it. *Held*, that the company by its charter had the right to raise the waters not only of the ponds but of the river below for a reasonable distance, and that the fact that the land between the dam and the ponds was in another State did not make the conduct of the corporation *ultra vires*.

A conveyance by deed, to a corporation authorized to maintain a reservoir, of the right "to flow and overflow" the grantor's land described in the deed, grants by implication the right to have the land left as a part of the reservoir to be filled with water.

Where a right by prescription to flow certain land is claimed by a corporation, authorized to maintain a reservoir, founded on an open continuous adverse use of the land for flowing for more than seventy-five years, a deed to the corporation

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from a former owner of the land, which for want of proper recording was not effectual to pass a title except between the parties to it, purporting to convey the right "to flow and overflow" the land, is admissible in evidence to show the nature of the use, in reference to the right claimed to be exercised in keeping water on the premises.

Where secondary evidence is admissible of a lost deed executed in 1827, conveying land then in the State of Rhode Island, a copy of the deed from a registry in this Commonwealth, where it was recorded by mistake in 1828, may be admitted in connection with other facts as evidence of the execution and delivery of the deed, the registry in which the deed was recorded having become by a statute of 1862 the place where the record of all deeds of the land in question should be found.

PETITION, filed November 14, 1901, in the Court of Registration, to register the title of the petitioners as tenants in common of a tract of land which before St. 1861, c. 187, was a part of Tiverton in the State of Rhode Island, on the Quequechan or Fall River, between the Watuppa Ponds and the dam of the respondent, in that part of the city of Fall River which formerly was the town of Troy.

In the Court of Registration *Davis*, J. made a decree ordering registration of the petitioners' title subject to the easement claimed by the respondent. The petitioners Phillips and Slade alleged exceptions, raising the questions stated by the court.

A. S. Phillips, for the petitioners.

A. J. Jennings & I. Brayton, for the respondent.

KNOWLTON, C. J. This is a petition by three tenants in common to register their title to a tract of land on the river between Watuppa Ponds and the dam of the respondent in Fall River. The Court of Registration found and ruled that the land is subject to an easement in favor of the respondent to flow the property to a specified depth, which easement precludes filling the land by the owners of the soil. A decree for the petitioners was entered, subject to this easement, and the petitioners excepted to certain rulings and refusals to rule touching the existence and nature of the easement. The petitioner Jennings disclaimed any right to deny the existence of the easement, and the exceptions are prosecuted by the other two petitioners alone.

The questions are raised under the St. 1826, c. 31, in reference to the acts of the respondent as a corporation. By this statute the Watuppa Reservoir Company was incorporated "for the purpose of constructing a reservoir of water in the Watuppa Ponds, so called, . . . for the benefit of the manufacturing establish-

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ments, on Fall River." It is given "power to make reserves of water in the Watuppa Ponds, so called, by erecting a dam across the outlet of said ponds, in the town of Troy," so as to raise the water in the ponds to a specified height, and is authorized to acquire and hold real estate for this purpose, by purchase or otherwise. There is also a provision for the recovery of damages by persons injured by the flowing. The town of Troy is now a part of the city of Fall River. In the year 1827 the respondent erected a dam on the river in the town of Troy at a little distance from the nearest pond, and has maintained it ever since. The petitioners' land is a swamp lying along the river between the dam and the pond, and until the entry of the decree of the Supreme Court of the United States in December, 1861, which established a new boundary line between Massachusetts and Rhode Island, it was in the State of Rhode Island. In a part of the land the respondent claims an easement under a deed which it received from one Currier on September 1, 1827, which was duly recorded and which conveyed a perpetual "right to flow or overflow" so much of the lot described as may be flowed by raising the water of the Watuppa Ponds to a stated height. In the remainder of the land the respondent claims a similar right by prescription. Since the erection of the dam in 1827, the respondent has maintained it continually, and has thereby flowed the lands during the greater part of every year to the height prescribed by the deed. The land over which the right is claimed by prescription is included in another deed from one Dwelly to the respondent, dated September 14, 1827, which was duly executed and delivered, but which, instead of being recorded in the proper registry in Rhode Island, was recorded by mistake on March 25, 1828, in the registry of deeds for Bristol County. In 1862, after this land had become a part of Massachusetts, a transcript of the records of that part of the town of Tiverton, Rhode Island, to which the land had previously belonged, was filed in the registry of deeds for Bristol County, and a person searching the records for conveyances in this part of Fall River previously to that date would examine this transcript instead of the earlier records in Bristol County. The petitioners contend that the acquisition of a title to the easement in this land by this respondent under the deed or by prescription, was

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ultra vires, because the corporation was authorized to raise the waters of Watuppa Ponds and not the waters of the river below, and because the land was not then in the Commonwealth of Massachusetts. We are of opinion that this contention is without foundation. The corporation was authorized to erect a dam "across the outlet of said ponds, in the town of Troy." The river was the outlet of the ponds and the dam was erected in the town of Troy. The precise point on the river at which the dam should be erected, was not fixed by the statute. The distance of the dam from the pond is not stated in the bill of exceptions, but there is nothing to show that it was unreasonably great for the construction of a reservoir of water in the ponds, under authority of the statute. The fact that the land between the dam and the pond was in another State, did not make the conduct of the corporation *ultra vires*, so long as the corporation did nothing in violation of the law of that State. *Kennebec Co.* v. *Augusta Ins. & Banking Co.* 6 Gray, 204, 208. Moreover, the conduct of the respondent in this particular has been considered by the court in previous cases and treated as within the authority of its charter. *Watuppa Reservoir Co.* v. *Mackenzie*, 132 Mass. 71. *Watuppa Reservoir Co.* v. *Fall River*, 134 Mass. 267, 271.

The petitioners contend that the deed from Currier was not a conveyance of an easement, but the release of damages for the exercise of a right to maintain a dam without interference with the right of the grantor at any time to fill his land, like damages which may be recovered under the mill act. See *Lowell* v. *Boston*, 111 Mass. 454, 466. But the language of the deed contradicts this contention. The deed conveys a right "to flow and overflow", and this, taken in connection with the purpose of the respondent to maintain the reservoir as shown by the statute under which it was acting, implies a right under the deed to have the land left as a part of the reservoir to be filled with water. This was expressly adjudicated in reference to another deed of similar language in *Watuppa Reservoir Co.* v. *Mackenzie*, 132 Mass. 71. See also *Boston & Roxbury Mill Corp.* v. *Newman*, 12 Pick. 467, 482; *Commonwealth* v. *Roxbury*, 9 Gray, 451, 500. This right is an easement in the land which precludes filling by the owner to exclude the water.

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The right claimed by prescription results from an open, continuous adverse use of the land by flowing for more than seventy-five years. The deed from Dwelly, whose language descriptive of the right conveyed is almost identical with that of the deed from Currier, shows that the right claimed and which must have been known by the grantor to be claimed by the respondent in connection with the flowing, was a right to flow and overflow for the purpose of maintaining a reservoir of water, and not merely a right to maintain a dam to set back water which the landowner might exclude from his premises by filling them. The deed, although for want of proper recording not effectual to pass a title except as between the parties to it, is evidence of the nature of the use in reference to the right claimed to be exercised in keeping water on the premises, and the principle applicable to the title held under Currier's deed is applicable to this holding by which a prescriptive right was gained. See *Watuppa Reservoir Co.* v. *Mackenzie*, *ubi supra*.

The remaining exception relates to the admission of the Dwelly deed in evidence. After referring to the deed from Currier, the petitioners' bill of exceptions states as a fact which was not controverted, the following, namely: "September 14, 1827, Jeremiah Dwelly, the then owner of the Dwelly lot, granted, or attempted to grant, to the respondent company the right to flow his portion of the locus by a deed which was never recorded in Rhode Island, but was recorded March 25, 1828, by mistake, with Bristol County, Northern District, deeds. A copy of each deed is hereto annexed and made a part of these exceptions." The respondent being unable to find the original Dwelly deed, a copy of the registry record of it was admitted against the petitioners' objection and exception.

It is difficult to see how the admission of the copy harmed the petitioners or added anything to the uncontroverted fact above stated. But if we assume that the fact was proved by the evidence admitted under exception, we are of opinion that there was no error. The original deed having been lost, secondary evidence was admissible to prove it. The copy was from an ancient official record. Such a record showing such a deed is good evidence of the existence of the deed when it was recorded. If this registry were the place then prescribed by law for re-

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cording the deed, the proof would be perfect. By the transfer of the land to Massachusetts it has become the place where the record of all deeds of the lands transferred should be found. St. 1862, c. 48, § 11. Although the recording in this case was not effectual, we are of opinion that the existence of such an ancient record may be shown in connection with other facts as evidence of the execution and delivery of the deed. An ancient deed, if found where such a deed might be expected to be found, and if the possession has been in conformity with it, is admissible in evidence without proof of its execution. *Stockbridge* v. *West Stockbridge*, 14 Mass. 257. *Green* v. *Chelsea*, 24 Pick. 71. When secondary evidence is admissible to establish a title, the law of this Commonwealth is very liberal in allowing the introduction of ancient records as well as ancient deeds. *Stetson* v. *Gulliver*, 2 Cush. 494. *King* v. *Little*, 1 Cush. 436. *Chenery* v. *Waltham*, 8 Cush. 327. *Palmer* v. *Stevens*, 11 Cush. 147, 152. *Rust* v. *Boston Mill Corp.* 6 Pick. 158, 165.

Exceptions overruled.

ANDREW P. DOYLE *vs.* FRANK R. KIRBY.

Bristol. October 27, 1903. — November 25, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Slander. Elections. Bribery.

In a declaration for alleged slander in charging the plaintiff, who was a candidate for mayor of a city, with having sold his vote at an election, an averment, that the plaintiff was greatly injured in his candidacy for the office of mayor, is not a proper averment of special damage.

To charge a person orally with having sold his vote at an election does not impute the commission of a crime and is not actionable without averment and proof of special damage.

The laws incorporated in R. L. c. 11, deal with the whole subject of illegal voting, including bribery at elections, and provide no punishment for a voter receiving a bribe, superseding the common law in this regard.

TORT for alleged oral slander. Writ dated November 15, 1902.

The declaration as amended alleged that the plaintiff being

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of good reputation was nominated for the office of mayor of the city of New Bedford, and that the defendant did publicly and maliciously accuse the plaintiff of having sold his vote as a citizen at an election of the citizens of New Bedford, and thereby of having participated in the commission of the crime of bribery, by words spoken of and concerning the plaintiff substantially as follows: "That's a great man" (meaning the plaintiff) "to nominate" (meaning the plaintiff) "who sold his" (meaning the plaintiff's) "vote" (meaning thereby that the plaintiff, being a registered voter of the city of New Bedford, had sold his vote at an election of the citizens thereof). "That man Doyle sold his vote" (meaning thereby the plaintiff had violated his suffrage). "They've got his name over there on the books" (meaning thereby that the plaintiff had been guilty of selling his vote as an elector of New Bedford and that such sale was recorded).

The declaration further alleged, that by reason of the publication of such false, scandalous and malicious words the plaintiff had been greatly injured in his good name and had been exposed to a prosecution for bribery, and had suffered great pain and anxiety of mind and was greatly injured in his candidacy for the office of mayor of the city of New Bedford.

The defendant demurred to the declaration, alleging, among other grounds of demurrer, that the words alleged to have been spoken did not by their natural import, or as connected with any state of facts alleged as existing at the time, charge or impute any crime or misdemeanor whatever, and were not slanderous *per se*, and that the amended declaration did not contain any sufficient allegation of special damage; also, that the amended declaration did not state a legal cause of action substantially in accordance with the rules contained in R. L. c. 173.

The Superior Court sustained the demurrer, and gave judgment for the defendant. The plaintiff appealed.

J. P. Doran & E. T. Bannon, for the plaintiff.

E. J. Hadley & B. B. Barney, for the defendant.

KNOWLTON, C. J. The defendant demurred to the declaration on different grounds, some of which it is unnecessary to consider.

The declaration contains no proper averment of special damages to the plaintiff. It does not allege that the words were

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spoken of him in any office or occupation. It does not state how they caused him any special damage. When special damage is stated as a cause of action in slander, it is necessary to set forth the particulars of the damage sufficiently to enable the defendant to know what is relied on, so that he may properly prepare his defence. *Cook* v. *Cook*, 100 Mass. 194. *Morasse* v. *Brochu*, 151 Mass. 567, 572. *Swan* v. *Tappan*, 5 Cush. 104.

As this action is not for a libel, but for a slander by spoken words, there can be no recovery in the absence of a plea and of proof of special damages, unless the words impute the commission of a crime. *Goodrich* v. *Hooper*, 97 Mass. 1. *Sillars* v. *Collier*, 151 Mass. 50. Odgers, Libel & Slander, (3d ed.) 59.

The plaintiff is charged with having "sold his vote." If we assume in his favor, without deciding, that upon the facts alleged in the declaration the words might be found to mean that he sold his vote at an election of citizens of New Bedford, we come to the question whether such a sale is a criminal offence under our laws. The plaintiff concedes that there is no statute which makes such a sale punishable in this Commonwealth. But he contends that it is a crime at common law, and that this part of the common law is still in force here.

Bribery at elections of members of parliament was an offence at common law in England, and so, probably, was bribery at municipal elections. 1 Bl. Com. 179. 1 Russ. Crimes, (6th ed.) 455. Whart. Crim. Law, § 1858. 1 Bish. Crim. Law, § 471. *Rex* v. *Pitt*, Burr. 1335. *The King* v. *Plympton*, Ld. Raym. 1377. *State* v. *Jackson*, 73 Maine, 91. See also *Commonwealth* v. *Silsbee*, 9 Mass. 417. At common law, as well as under some of the English statutes, there seems to be no difference in liability between the giver and the taker of a bribe. Sts. 2 Geo. II. c. 24, § 7; 17 & 18 Vict. c. 102. In this Commonwealth, our statutes punishing the giving of money for voting at elections have not made the receiver punishable. Pub. Sts. c. 7, §§ 60, 61. Gen. Sts. c. 7, § 31. Assuming in favor of the plaintiff, that before the enactment of statutes on this subject, the receipt of money as an inducement to vote in a certain way at an election was punishable in this Commonwealth as a crime at common law, it becomes necessary to consider our legislation.

It is a recognized principle that the enactment of a statute

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which seems to have been intended to cover the whole subject to which it relates, impliedly repeals all existing statutes touching the subject and supersedes the common law. *Commonwealth* v. *Cooley*, 10 Pick. 37. *Commonwealth* v. *Marshall*, 11 Pick. 350. *Jennings* v. *Commonwealth*, 17 Pick. 80. *Lakin* v. *Lakin*, 2 Allen, 45, 46. *Commonwealth* v. *Dennis*, 105 Mass. 162. From time to time statutes have been enacted dealing with the subject of bribery at elections. In the later of these statutes the Legislature has attempted to cover the whole subject of elections, and especially the subject of offences in connection with elections. Chapter 11 of the Revised Laws is entitled, "Of Elections." It contains four hundred and twenty-six sections covering one hundred and two pages. The general title "Of Elections," is divided into forty-four sub-titles, of which one is "Corrupt Practices," one is "Penalties upon Officers," one is "Penalties upon Voters," and another is "General Penalties." Besides these, seven sections are devoted to the title, "Inquests in Election Cases," which contain provisions for the discovery of violations of the law. The twenty-two sections relating to "Corrupt Practices" provide for the punishment of a great many different offences. The twenty-one sections dealing with "Penalties upon Officers" and "Penalties upon Voters" prescribe punishment by fine or imprisonment for twenty-one different offences. There are also thirty-four sections which prescribe "General Penalties," each one of which creates a separate offence punishable by fine or imprisonment. Of these, § 415 is for "Bribery at Elections," and § 414 is "For Attempting to Influence Voter by Threats," etc. These sections prescribe punishment for one who bribes or attempts to bribe, and for one who threatens a voter to influence his vote. The St. 1890, c. 423, from which most of the provisions of the R. L. c. 11, relating to penalties, are taken, is entitled, "An Act to revise the laws relating to elections." It seems pretty plain that the Legislature, in these statutes, intended to cover the whole subject of punishment for illegal voting and illegally influencing voting at elections, including as well improper conduct on the part of voters as improper conduct by bribery or otherwise on the part of those seeking to influence voting. After creating such a large number of punishable offences, going into such detail as to every kind of miscon-

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duct, it is inconceivable that the Legislature intended to leave the common law in force as to any form of bribery at elections. It seems, rather, that in accordance with earlier statutes in this State, and statutes in other States, and the general practice in America, the Legislature thought it wise to deal with the purchase of votes through the prosecution and punishment of those who buy them, rather than through the punishment of the voter whose action is improperly influenced by the receipt of money.

We are of opinion that the statutes referred to supersede the common law in regard to bribery at elections, and that the language of the declaration does not charge the commission of a crime.

Judgment affirmed.

JOHN F. GILE *vs.* J. W. BISHOP COMPANY.

Bristol. October 27, 1903. — November 25, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Negligence.

A master mechanic of a mill corporation, attending to his business in the mill yard, is not a mere licensee when standing in a driveway near a pile of heavy timber placed there and being worked upon by servants of an independent contractor engaged in altering one of the buildings of the corporation, and, if the servants of the contractor by their negligence cause one of the timbers to fall upon the mechanic while he is standing there in the exercise of due care, he can recover from the contractor for his injuries.

A master mechanic of a mill corporation may be found to be in the exercise of due care when standing in a driveway of the mill yard near a pile of heavy timber placed there by the servants of an independent contractor, with his back to the pile, conferring with the yard master on business of the mill, while the servants of the contractor are working on the timber, and, if he is injured owing to the negligence of the contractor's servants as to the mode of piling the timber or in rolling over one of the timbers so as to cause the outside timber to fall upon him, he can recover from the contractor for his injuries.

TORT, for personal injuries alleged to have been caused by the negligence of the defendant's servants. Writ dated March 27, 1902.

At the trial in the Superior Court before *Lawton*, J., the following facts appeared:

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The plaintiff was, and had been for twelve years, master mechanic of the City Manufacturing Corporation, a corporation engaged in the manufacture of cotton yarn in the city of New Bedford. The defendant, under an independent contract, was engaged in the erection of an addition to the picker house of the corporation. The picker house referred to adjoined one of the main mills. Running the whole length of the main mill building and the picker room was a driveway, which began at the entrance to the mill yard. On either side of the driveway were piles of timbers of North Carolina hard pine, such as are described in the opinion, which had been placed there by the defendant's men.

The plaintiff and the yard master stopped in the roadway near one of these piles of timber to confer on business of the mill. A team came along and they stepped toward the pile of timber, and stood there, the plaintiff with his back to the timber and the yard master sideways to it, facing the plaintiff. The defendant's men were squaring and chamfering the ends of the timbers, and as they finished one, rolled it over and started on the next one. When they rolled the one next to the outside timber, that timber fell upon the plaintiff, breaking both of his legs.

At the close of the evidence the defendant asked the judge to rule, that on the whole evidence the plaintiff could not recover, and that the plaintiff as to the defendant was a mere licensee and the defendant owed no more duty to him than to a stranger. The judge refused to rule as requested.

The jury returned a verdict for the plaintiff in the sum of $4,000, which on the requirement of the judge was reduced to $3,000. The defendant alleged exceptions.

A. E. Perry & O. S. Cook, for the defendant.

E. D. Stetson & G. O. Tobey, Jr., for the plaintiff.

KNOWLTON, C. J. The evidence tended to show that the defendant's servants piled timbers of North Carolina hard pine, whose transverse dimensions were eighteen by twelve inches and which were of various lengths, making their weight from two to two and one half tons each, along the side of a driveway in the yard of the City Manufacturing Corporation. They were piled upon blocking, some of which was very short. These men were engaged in squaring and chamfering the ends of the timbers, and

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as they finished one they rolled it over and started on the next. While the plaintiff, the master mechanic of the City Manufacturing Corporation, was standing at the side of one of these piles of timbers, talking with the yard master on business of the corporation in which he was engaged, the defendant's servants rolled over one of these timbers and thereby caused the timber next to which the plaintiff was standing to fall over upon him and injure him. The evidence well warranted the jury in finding that there was negligence for which the defendant was liable, either in the mode of piling the timbers, or in the conduct of the workmen in rolling over one of them just before the accident, or in both, and that this negligence caused the plaintiff's injury. *Mahar* v. *Steuer*, 170 Mass. 454.

The defendant contends that the plaintiff was a mere licensee, and that it owed him no duty except to refrain from wilfully or wantonly injuring him. But this contention is not supported by the evidence. The defendant was engaged in the alteration of a picker house of the City Manufacturing Corporation and the corporation was at the same time continuing its business. The defendant was not in exclusive occupation of the yard and grounds of the City Manufacturing Corporation. It used them so far as was necessary for the convenient performance of the work which it had undertaken, and at the same time the employees of the corporation were expected to use them so far as was necessary or proper in the prosecution of the business of that corporation. The defendant was, therefore, bound to exercise reasonable care in reference to these employees who were rightfully there.

There was evidence for the jury in support of the proposition that the plaintiff was in the exercise of due care. They might find that he had no reason to expect that the timber would fall, either from negligent piling, or from the careless conduct of the workmen in rolling over one of the timbers while he was standing at the side of the pile.

Exceptions overruled.

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BENJAMIN I. STOWELL & others *vs.* BOARD OF PUBLIC WORKS FOR THE CITY OF NEW BEDFORD & another.

Bristol. October 27, 1903. — November 25, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Way. Trespass.

An order laying out a street, made by a board having jurisdiction over the subject, cannot be attacked in an action of tort. If such an order is defective for want of sufficient notice to remove walls, fences and trees, the remedy is by certiorari.

If an order laying out a street gives a landowner a reasonable time to remove his walls, fences and trees, and before that time has elapsed they are destroyed in the construction of the highway, the owner cannot recover for his loss in an action of tort, but only by a petition under the highway act for damages occasioned by the laying out of the street.

TORT, in the nature of trespass, against Charles S. Ashley and others, members of the board of public works for the city of New Bedford under St. 1889, c. 167, as amended by St. 1890, c. 342, and the superintendent of streets of that city, alleging that the defendants by their agents and servants entered the plaintiffs' close and cut down and carried away trees and plants growing thereon, and tore down walls and fences of the plaintiffs. Writ dated April 21, 1900.

At the trial in the Superior Court before *Braley*, J., it appeared that the acts complained of were done under an order of the board of public works made on April 23, 1894, as to the laying out and widening of Kempton Street in New Bedford.

The order, after recitals, concluded as follows: "Ordered, That the parcel of land before described be, and the same hereby taken and laid out and accepted under the provisions of the Highway Act as a public street or way of the said city, to be known as Kempton Street, and the grade thereof is established according to a plan of the said laying out and profile of grade by W. F. Williams, City Land Surveyor, dated July 28, 1893, and deposited in the office of this Board; that this Board doth adjudge that there are no damages to the estates, parts of which are taken as above, and that all persons or parties, owners of land in the line of said lay out, remove and take away any and

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all buildings, fences, or trees from the land so taken within days from and after the adoption of this order."

The plaintiffs contended that the order was defective in that no time was given in which to remove the walls, fences and trees; and further contended that, even if the lay out was not invalid, it was the duty of the board to give notice to the plaintiffs before they entered on the land, to remove the walls, fences and trees of the plaintiffs, and that not having done so it was a trespass.

The defendants contended that the legality of the lay out could not be attacked collaterally, and that the plaintiffs' remedy was by certiorari.

The judge ruled that for the purposes of this case the lay out was valid, and that a reasonable time had elapsed from the date of the lay out within which Nancy R. Stowell or the plaintiffs, her heirs at law, could have removed the trees, plants and wall, and that upon all the evidence in the case the plaintiffs were not entitled to recover. By agreement of parties the case was submitted to the jury to find and assess such damages as the plaintiffs actually had sustained. The jury found and assessed such damages in the sum of $427.78 and the judge ordered a verdict for the defendants. At the request of the plaintiffs and by agreement of the parties, the judge reported the case for determination by this court. If the ruling that upon all the evidence the plaintiffs were not entitled to recover was right, judgment was to be entered upon the verdict; otherwise judgment was to be entered for the plaintiffs in the sum of $427.78.

J. L. Gillingham, for the plaintiffs.

B. B. Barney, for the defendants.

HAMMOND, J. This is an action of tort in the nature of trespass for entering upon the land of the plaintiffs and cutting down and carrying away certain trees and shrubs growing thereon and doing other acts more particularly described in the declaration.

It appeared that the acts complained of were done by the defendants acting under the order of April 23, 1894, passed by the proper authorities, purporting to lay out a public street over the locus; and it was not denied by the plaintiffs that in the construction of the street the acts were reasonably necessary. The plaintiffs contend that the order was "defective in that no time

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was given in which to remove the walls, fences and trees," and further, that "even if it should be said that the lay out was not invalid in whole or in part, it was still the duty of the board" before entering upon the land to give notice to the plaintiffs to remove the walls, fences and trees; and that since no such notice was given the entry was a trespass.

Upon the facts shown in this case, the board by which the order was passed had jurisdiction over the subject of the laying out of the street, and even if the order was defective by reason of its failure to name the precise time within which the owner might remove the walls, fences and trees, its validity cannot for that reason be attacked collaterally. Certiorari is the only proper remedy. There is a difference in this respect between the proceedings of a town and those of a board like this. *Robbins* v. *Lexington*, 8 Cush. 292. *Taber* v. *New Bedford*, 135 Mass. 162. *Foley* v. *Haverhill*, 144 Mass. 352, and cases there cited. The order therefore must stand, and it furnishes a legal justification for such acts of the defendants as were reasonably necessary for the construction of the street.

Under the form of the report it is not necessary to consider whether the fair construction of the order is, as claimed by the defendants, that the owner should have a reasonable time to remove his property and that such time had elapsed before the defendants committed the acts complained of, because, even if by reason of lack of notice to remove, the plaintiffs were entitled to the value of the things removed, the damages for the loss are not recoverable in an action of tort, but they would form a part of the sum recoverable in a petition under the statute for damages occasioned by the laying out of the street. *White* v. *Foxborough*, 151 Mass. 28.

The ruling that upon all the evidence the plaintiffs were not entitled to recover was right, and in accordance with the terms of the report judgment is to be entered for the defendants.

So ordered.

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HAVERHILL SAVINGS BANK *vs.* CAROLINE M. GRIFFIN.

Essex. November 4, 1903. — November 25, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, LORING, & BRALEY, JJ.

Easement. Deed.

Under a deed which contains no express grant of a right of drainage, the right to maintain a drain not in existence when the deed was given cannot pass by implication as appurtenant to the land.

In a deed of a building lot the words "reserving to the lot next southerly owned by G. the right to enter a drain into a private sewer now on said land", where no such right in G. already exists, do not constitute an exception, but create a reservation, enuring solely to the grantor and giving no easement to G., a stranger to the deed.

BILL IN EQUITY, filed August 17, 1901, to restrain the defendant from using and maintaining a drain from certain land on the east side of Auburn Street, in Haverhill, owned by the defendant, through land on the south side of Sixth Avenue in that city owned by the plaintiff, and praying that the plaintiff be authorized to close the portion of the drain upon its land.

In the Superior Court *Stevens*, J. made a decree granting the relief prayed for; and the defendant appealed. At the request of the defendant the judge reported the material facts found by him, in accordance with R. L. c. 159, § 23.

The report was in substance as follows: The defendant is the owner of the land described as hers in the bill, bounded on the north by the land of the plaintiff also described in the bill. Both parcels of land were owned on and before November, 1885, by one Algernon P. Nichols, who had died before the filing of the bill. The land owned by the defendant was conveyed to her by Nichols by a warranty deed in common form dated November 4, 1885. The land owned by the plaintiff was conveyed to one Warren Hoyt by Nichols, by a warranty deed in common form dated July 12, 1886. In this deed the plaintiff's land was described as bounded on the south by land of Caroline Griffin about one hundred and seven feet more or less, and contained the following clause: "And reserving to the lot next southerly owned by Griffin the right to enter a drain into a private sewer

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now on said land." The plaintiff acquired its title through a mortgage given by Hoyt to the plaintiff and foreclosed by the plaintiff. The mortgage did not contain any words relating to the drain. After the conveyance to the defendant, a drain was constructed by her from the lot owned by her into and through the Nichols land, afterwards conveyed to Hoyt. This drain connected with the sewer on Hoyt's land, and from the autumn of 1885 was in continuous use draining the defendant's lot.

The deed from Nichols to Hoyt containing the clause above quoted was as follows, omitting the portion after the habendum clause which contained the ordinary covenants of a warranty deed:

"Know all men by these presents that I, Algernon P. Nichols of Haverhill in the County of Essex and Commonwealth of Massachusetts, in consideration of two thousand dollars paid by Warren Hoyt of said Haverhill, the receipt whereof is hereby acknowledged, do hereby give, grant bargain sell and convey unto the said Warren Hoyt a certain parcel of land in said Haverhill on the southerly side of Sixth street and bounded on the North by said St. one hundred and ten feet more or less, on the east by land of the Children's Aid Society, about one hundred feet more or less, on the south by land *land* of Caroline Griffin about one hundred and seven feet more or less, and on the West by Auburn street about one hundred feet. Saving and reserving nevertheless to myself and my heirs and assigns forever for the use of said Children's Aid Society a right to pass and repass upon and over a strip of land four feet (4 ft.) wide and seventy-five feet long, extending southerly from Sixth St. and next to land of said Society, so as to make a passage way for the exclusive benefit — the adjoining estates twelve feet wide including the eight feet in width which I reserved for such use in my deed to said Society, and reserving to the lot next southerly owned by Griffin the right to enter a drain into a private sewer now on said land. To have and to hold the granted premises with all the privileges and appurtenances thereto belonging to the said Hoyt and his heirs and assigns to their own use and behoof forever."

H. N. Merrill, for the defendant.

F. H. Pearl, for the plaintiff.

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BRALEY, J. At the time the defendant obtained title to her land the drain was not in existence and the deed under which she holds is silent as to any right to lay and maintain such a drain through the land of the plaintiff. Neither does it appear that this alleged right whereby the defendant would be entitled to connect her premises with the public sewer, can be said to arise by implication. See in this connection *Bumstead* v. *Cook*, 169 Mass. 410.

The case falls within the well recognized general rule that where an easement is not set out in the instrument under which the party claiming the privilege holds title, it must be shown to be actually in existence and connected with the estate conveyed in order to pass as appurtenant by implication. *Philbrick* v. *Ewing*, 97 Mass. 133. *Bass* v. *Edwards*, 126 Mass. 445, 449.

In order therefore to maintain her claim she is necessarily obliged to rely on the clause in the deed to the plaintiff's grantor which is in these words, "and reserving to the lot next southerly owned by Griffin the right to enter a drain into a private sewer now on said land," and the rights of the parties must be determined on the construction to be given to this clause.

At the date of this deed so far as the facts appear by the record no such right had been granted to or prescriptively acquired by the defendant, and which might be preserved for her use by the language used, on the ground that thereby an exception was created and hence the easement claimed was excepted from the grant. But they must be construed as an attempt to vest in the grantor a new interest or right that did not before exist and therefore constitute a reservation rather than an exception. *Wood* v. *Boyd*, 145 Mass. 176. *White* v. *New York & New England Railroad*, 156 Mass. 181.

As the defendant was not a party but a stranger to the deed she could gain no rights under the reservation which enured solely to the grantor, and for this reason she did not acquire an easement under it. *Murphy* v. *Lee*, 144 Mass. 371, 374.

It follows that the decree entered in the Superior Court was right and should be affirmed.

Decree affirmed.

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WALTER HUMPHREYS *vs.* PORTSMOUTH TRUST AND GUARANTEE COMPANY.

Essex. November 4, 1903. — November 25, 1903

Present: KNOWLTON, C. J., MORTON, BARKER, LORING, & BRALEY, JJ.

Negligence.

A workman employed in a shoe factory on the second floor of a building, who on the third morning of his employment is injured by falling down an elevator well when entering the building by a rear door on an alley way, may be found to have been in the exercise of due care, as against the owner of the building in control of the elevator, if it appears, that on the first morning he entered the building by the front door, that on the second morning he followed other workmen through a rear door into a small dark entry leading by a staircase to the factory, and that on the third morning, which was dark, he was alone, and, supposing that he was entering by the same rear door, entered another similar door near it which was open and led into the elevator well down which he fell.

TORT for personal injuries from falling into an elevator well in a building in the city of Lynn owned by the defendant. Writ dated March 13, 1901.

At the trial in the Superior Court before *Wait*, J., it appeared that the plaintiff was employed by Charles W. Porter, a shoe manufacturer doing business under the name of William Porter and Son, and occupying the second story of the defendant's building. Porter testified that during his occupation the defendant took care of the elevators. There were three entrances to the Porter factory, one on Willow Street, another on Blake Street, and the third through an alley way which led to the rear of the building. The plaintiff testified that he had been in the employ of William Porter and Son two and one half days before he was hurt; that the first day he entered through the Blake Street entrance by the office, the front way; that the second morning he entered by the rear entrance, as he could not get in by the front door and therefore had to go around to the rear door on the alley way; that the Willow Street entrance was locked and there was a sign there stating that employees must use the rear door; that he followed other workmen around through the alley way to this rear door and followed them in; that he went into a small entry way and thence upstairs to his work;

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that there was no light at all in this entry; that it was dark, and that looking down he could not see the floor.

The plaintiff further testified that on the easterly side of the alley way, side by side, there were two entrances, the one nearest Almont Street being the entrance to the small entry way by which the plaintiff had entered on the morning of the day before he was hurt; that this door was three feet ten inches wide; that the door leading to the elevator well was the second entrance coming from Almont Street and was five feet two inches beyond the first entrance; that both entrances were in the same line of wall and the same height from the ground; that the elevator entrance was four feet three inches wide; that both entrances appeared the same; that each entrance had two fire doors which swung outward to each side and were painted a dark green; that he did not know there was an elevator or an elevator entrance there; that on the third morning, the day of the accident, he was alone, walked past the entrance he had used the previous morning and came to the elevator entrance, the doors being open without guard or gate and flat against the side of the building; that he supposed it was the same door he had entered the previous morning, and stepped in intending to go upstairs; that he looked in and saw a closed door which he intended to open and go upstairs, as on the previous morning he had opened a door to go up to the factory; and that when he stepped in he fell twelve feet and five inches to the bottom of the elevator well. The facts as to the hour and the darkness of the morning are stated by the court.

At the close of the evidence the judge refused to order a verdict for the defendant. The jury returned a verdict for the plaintiff in the sum of $825. The judge submitted to the jury the following questions: 1. Was the plaintiff in the exercise of due care? 2. Was the defendant in control of the elevator? 3. Was the defendant negligent? To each of these questions the jury answered "Yes." The judge reported the case for determination by this court. If the ruling of the judge was right, judgment was to be entered on the verdict; otherwise judgment was to be entered for the defendant.

J. H. Sisk, (*R. L. Sisk* with him,) for the defendant.

W. H. Niles, for the plaintiff.

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LORING, J. We are of opinion that judgment should be entered on the verdict.

1. The evidence warranted a finding that the plaintiff was in the exercise of due care. It is ordinarily true that a person who walks into an elevator well is guilty of contributory negligence. *Taylor* v. *Carew Manuf. Co.* 143 Mass. 470. *Patterson* v. *Hemenway*, 148 Mass. 94. *Keenan* v. *Edison Electric Illuminating Co.* 159 Mass. 379. *Ballou* v. *Collamore*, 160 Mass. 246. *McCarvell* v. *Sawyer*, 173 Mass. 540. It is also true that a person who goes forward in the dark in a place with which he is not acquainted is not in the exercise of due care. *Campbell* v. *Abbott*, 176 Mass. 246. *Daley* v. *Kinsman*, 182 Mass. 306. But in the case at bar the plaintiff under the circumstances might well have mistaken the elevator door, which was open, for the door by which he entered the day before, which was shut, without being guilty of negligence. The accident happened at five to seven minutes after seven o'clock in the morning of January 4, and there was evidence that the morning was damp, misty, cloudy and dark. There was also evidence that the alley way on which the two doors opened was not more than ten feet and one half wide, and was hemmed in on each side by brick buildings of the ordinary color, six stories in height. That it was so dark there at the time that a person in the alley way could see only as in the dusk. It appeared that the two doors were similar in appearance, the door of the elevator being five feet beyond the door which the plaintiff should have taken, and that while the door he should have taken was closed the shutters of the elevator were open and "lay back against the wall shining all nice and bright." We are of opinion that under the circumstances of this case the plaintiff might be found to have gone forward in the dark without being guilty of negligence. The jury were warranted in finding it to be so dark beyond the entrance to the elevator that the plaintiff could not see whether there was a hole or floor in front of him. There was also evidence that the landing beyond the proper entrance was equally dark when the plaintiff used it the day before. Added to this there was a door on the left of each entrance which might be found to have further misled the plaintiff. The case is very like *Gordon* v. *Cummings*, 152 Mass. 513. See also *Parker* v. *Barnard*, 135 Mass. 116.

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2. The testimony of the plaintiff's employer warranted a finding that the elevator was within the defendant's control. He testified "that during his occupation the defendant took care of the elevators."

Judgment on the verdict.

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CHARLES N. WORMSTEAD *vs.* CITY OF LYNN.

Essex. November 5, 1903. — November 25, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, LORING, & BRALEY, JJ.

Municipal Corporations.

An order from the proper authorities to widen a public way, making it the duty of a city or town to perform the work of construction, gives no authority to the surveyor of highways or any municipal officer to perform the work or to make any contract for its performance without a vote of the city or town.

In order that a practice or custom adopted by a town or city should give authority to an officer to make contracts in its behalf, the adoption of the practice or custom must have been by a vote of the town or city.

Where a person enters into a contract with a public officer, who undertakes to act for and to bind a municipal corporation, he is bound at his peril to ascertain the extent of the authority of the public officer with whom he deals.

CONTRACT against the city of Lynn, for alleged breach of contract, with one count for loss of profits, and another for expenses incurred. Writ dated November 5, 1900.

At the trial in the Superior Court *Wait*, J. ruled that the plaintiff was not entitled to recover, and ordered a verdict for the defendant. He reported the case for determination by this court. If the city of Lynn could be bound by a custom or practice of the superintendent of streets to make contracts for the city in excess of the authority conferred upon him by statute and by the ordinances of the city, there was to be a new trial; otherwise the verdict was to stand.

J. A. O'Keefe, for the plaintiff.

S. Parsons & H. A. Bowen, for the defendant.

LORING, J. This is an action for damages for breach of a contract in which the plaintiff's claim was that the defendant city agreed to pay him for riprapping an embankment as part of the work necessary to carry into effect an order for widening

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a public way within the city limits. The breach relied on was a refusal on the part of the defendant to allow the plaintiff to do any work at all under the alleged contract. The defence set up was that it never entered into any contract with the plaintiff.

Where a public way is widened by the public authorities, it becomes the duty of the city or town in which it is situated to perform the work of construction. But the order for widening does not without more enable the surveyor of highways or any officer of the city or town (as the case may be) to perform the work on behalf of the municipality in question, or to enter into a contract on its behalf to have it performed. The city or town must by vote contract for the work or authorize some one else to do so in its behalf. *Bean* v. *Hyde Park*, 143 Mass. 245.

It is not pretended that any such vote was passed by the city of Lynn in the case at bar. The plaintiff however relies on this: He proved that one Tarbox, who was superintendent of streets of the defendant city and who as such had the duties and powers of a surveyor of highways, made with the plaintiff by word of mouth the contract sued on, with the approval, but not by vote, of the mayor and one member of the committee of the board of aldermen on streets. The committee on streets consisted of the mayor and two aldermen. The plaintiff also proved that the city engineer came to the location of the work and gave him the lines to be followed. He then offered to prove by Tarbox, (the present superintendent of streets of the defendant city,) by one Bates, (a former superintendent of streets of the defendant,) by one Ramsdell, (a former mayor,) and one Sampson, (a former alderman of the city,) "that the superintendent of streets for the city of Lynn for the past eleven years had been in the habit of letting contracts for amounts in excess of $10.00 for blasting and other similar work without authority from the committee on streets or the city council." The plaintiff also "offered to prove, if competent, that he had previously had a contract amounting to more than $10.00 with the city of Lynn to widen a portion of Walnut Street in said Lynn, and that he had completed said contract and received his pay." The plaintiff's contention is that a city or town, by a practice or custom adopted by it, may authorize one of its officers to make contracts in its behalf, or at any rate that it may by such a practice or cus-

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tom hold him out as having such authority, and be estopped to deny that he had such authority in case a person acts on the faith of such holding out; and he relies on what was said in *Blanchard* v. *Ayer*, 148 Mass. 174, 178, in support of this contention.

It is not necessary to go at length into the powers of a surveyor of highways in making repairs. Speaking generally, he has no power to bind the city or town unless the repairs are unprovided for, and then only if in entering into the contract he pursues the statutory requirements. *Blanchard* v. *Ayer*, 148 Mass. 174. The statutory requirements in question in *Blanchard* v. *Ayer* were changed by the effect of St. 1895, c. 374, § 1. See notes by commissioners on Revised Laws, c. 51, and R. L. c. 51, § 6.

As we have said, no one has authority to enter into a contract for the construction of a way which it has become the duty of a city or town to construct, until a vote of the city or town has been passed authorizing him so to do expressly or impliedly.

The plaintiff misapprehends what was meant by W. Allen, J. in *Blanchard* v. *Ayer*, 148 Mass. 174, 178, when he said that a town may authorize the surveyors to make contracts not within the statute "by express vote, or by a practice and custom adopted by the town." What was meant by "a practice and custom adopted by the town" is explained by what is said in the next paragraph of the opinion beginning with the words "If, for instance," and putting a case where a town by vote adopts a rule "that all bills for labor and materials in repairing the ways should be paid by the town treasurer, on the order of a highway surveyor approved by the selectmen, there can be no doubt that a person performing labor at the request of a surveyor, and having the proper order upon the treasurer for payment therefor, would have a right of action against the town. Authority by the town to make the contract for labor would be implied."

In the case at bar there was no evidence of authority given by practice or custom impliedly adopted by a vote of the city government of Lynn.

The other contention of the plaintiff is that the defendant city has held out the superintendent of streets as one having authority to contract, and is estopped to deny that authority as against

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the plaintiff who has acted on the faith of the practice which the city has allowed.

We do not stop to point out that the plaintiff's offer of proof might well be taken to be confined to letting contracts for the repair and not to extend to a contract for the construction of public ways. For the decisive answer to the whole contention is that the doctrine relied on by him has no application where a person enters into a contract with a public officer who undertakes to act for and to bind a municipal corporation or other body politic. Such a person is bound at his peril to ascertain the extent of the authority of the public officer with whom he deals. In such a case the money pledged for the payment of the contractor is the money of the public or of an ascertained portion of the public, and the public is not estopped by a violation of duty on the part of public officials, no matter how many officials may have been concerned in it, and no matter how long it may have continued. See in this connection *Abbott* v. *North Andover*, 145 Mass. 484, 486. To bind the public the body must act which by law can bind them. The rule has been enforced in cases where parties have undertaken to make out a ratification by use of a public structure constructed without authority. In *Keyes* v. *Westford*, 17 Pick. 273, a better road was built than was provided in the lay out by the county commissioners under a vote of the town authorizing the construction of the road as laid out. It was argued that as "the town have the benefit of it," it was bound to pay for the better road. See p. 279. It was held that the fact that the town never had voted for the better road was decisive of that argument. In the subsequent case of *Hayward* v. *North Bridgewater School District*, 2 Cush. 419, the fact that a school was kept in a schoolhouse built without authority, and that this was done by vote of the prudential committee of the school district, did not make the district liable because that committee had no authority to contract for the erection of a schoolhouse for the district. To the same effect see *Boston Electric Co.* v. *Cambridge*, 163 Mass. 64; and see *Delafield* v. *State*, 2 Hill, (N. Y.) 159; *Marsh* v. *Fulton County*, 10 Wall. 676.

The entry must be

Judgment on the verdict.

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FRED O. THOMPSON *vs.* WILLIAM J. BARRY & another.

Essex. November 5, 1903. — November 25, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, LORING, & BRALEY, JJ.

Equity Jurisdiction, Fraud. *Agency.*

In a suit in equity to compel a reconveyance to the plaintiff of a certain lot of land alleged to have been sold and conveyed by him upon the false and fraudulent representations of the agent of the purchaser, it appeared, that the purchaser's agent represented that his principal was a man with a wife and two children employed by a railroad corporation at a salary of $6,000 and was able to build and occupy a good dwelling house; that the plaintiff thereupon sold and conveyed the land to the agent for his undisclosed principal, to whom the agent conveyed it; that the purchaser was the Roman Catholic Archbishop of Boston, a corporation sole, and at once proceeded to erect a Roman Catholic chapel on the lot; that the purchaser's agent knew that the plaintiff had a prejudice against Roman Catholics, and had concealed the identity of the purchaser and the proposed use of the land for that reason. The deed contained restrictions as to the use of the land, which did not prohibit the use in question. The plaintiff paid a part of the commission of the purchaser's agent. The purchaser was ignorant of the agent's fraud. *Held*, that the representations of the purchaser's agent constituted an actionable fraud; *also*, that the fraudulent deceit as to the kind of purchaser to whom the plaintiff was selling was independent of the restrictions in the deed and not affected by them; *also*, that the rights of the plaintiff were not diminished by the fact that he paid a part of the commission of the purchaser's agent, and that, as it appeared that the agent was acting for the purchaser, the fact that the purchaser was ignorant of his fraud was immaterial.

BILL IN EQUITY, filed May 25, 1903, against William J. Barry, of Lynn, and the Roman Catholic Archbishop of Boston, a corporation sole, seeking to have a deed given by one Clara Van Horne to the defendant Barry and a deed from Barry to the Roman Catholic Archbishop of Boston, annulled on the ground of fraud alleged to have been practised by Barry on the plaintiff in procuring the execution and delivery of the deed to him, praying for a reconveyance of the land, for damages, and for further relief.

In the Superior Court the case was heard by *Schofield*, J., who found that the plaintiff was entitled to the relief sought, and, at the request of the parties, reserved the case under R. L. c. 159, § 29, for determination by this court upon the terms stated in the opinion.

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It appeared by the report of facts found by the judge, that before April 28, 1903, the plaintiff was the equitable owner of a lot of land in Swampscott described in the deeds of which copies were annexed to the bill. This land was about seventy-five feet wide by one hundred and seventy-five feet long, and contained over twelve thousand square feet. The plaintiff originally owned the land in common with his mother and sister, subject to a mortgage. The mortgage was foreclosed, and the legal title was put in the name of Clara Van Horne, who held the property for the plaintiff. The joinder of Clara Van Horne as a party plaintiff was waived.

The material facts as to the representations made by Barry are stated in the opinion.

The judge found, that at the times of receiving the deed and of paying for the property the defendant corporation was innocent of any concealment or misrepresentation, and had no knowledge or notice of any concealment or misrepresentation by its agent Barry, and had no knowledge that any charge of fraud or misconduct was made against Barry by the plaintiff until the bill was filed; that Barry was not authorized by the defendant corporation to make any false representations or to give any assurance or guaranty as to the use intended to be made of the land; that in taking the title in his own name Barry was acting as agent for the defendant corporation, and that he directed that the deed be made to him for the purpose of avoiding or delaying a disclosure of the name of the purchaser to the plaintiff; that, before the terms of the sale were agreed upon, the plaintiff, knowing that Barry was acting as agent for an unknown principal, agreed to pay him one half of the regular commission if he effected a sale; that when the deed to Barry was delivered the plaintiff paid him the amount agreed upon, which was $35; that the plaintiff did not inform Barry that he was the owner of the property, and that during the negotiations Barry supposed that the plaintiff was acting as agent for the owner. The deed from Van Horne to Barry contained a reference to restrictions contained in another deed, to which the land was subject. The restrictions referred to were as follows: "Subject to the following restrictions for thirty years from May 1, 1881. No building upon said premises shall be used during said period for any mercantile or manu-

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facturing purpose, nor for a livery stable, nor for the sale of liquor." The plaintiff drew the deed to Barry and knew when drawing the deed that these restrictions were inserted to limit the use of the land conveyed, and knew that this was a usual method employed to accomplish that object.

B. B. Jones, for the defendants.

W. H. Niles, for the plaintiff, was not called upon.

KNOWLTON, C. J. On the hearing of this suit the presiding judge found that the plaintiff was entitled to relief and ordered a decree in his favor. As the defendants desired to take the opinion of this court upon the questions of law involved, the judge decided not to enter the decree and leave the defendants to their right of appeal with a report of facts to complete the record under the R. L. c. 159, § 23, but availed himself of his power under the R. L. c. 159, § 29, to reserve and report the case instead of entering a decree. According to the terms of the reservation, if the ruling was right the decree is to be entered, otherwise, such decree as justice and equity require. This is the correct practice in all cases in which the justice desires to present the case to this court without an appeal and a report under § 23.

The defendants contend that the false representations of the defendant Barry, the agent of the defendant corporation in the purchase of the property, did not constitute actionable fraud. The agent deliberately and intentionally deceived the plaintiff in regard to the party who was purchasing. In fact he was acting for the Roman Catholic Archbishop of Boston, a corporation which was endeavoring to buy the land as a site for a Roman Catholic church or chapel. The land was situated on Elmwood Road between the lot owned by the plaintiff, upon which he had erected an expensive house and stable, where he has resided for about ten years, and a lot owned by one Earp upon which Earp erected a house which he occupies as a home. The plaintiff inquired of the agent whether a Catholic was going to buy the property, and the agent became aware that the plaintiff had a prejudice against Catholicism, and he studiously concealed from the plaintiff the fact that the defendant corporation was the intending purchaser, and that the land was intended to be used as a site for a Roman Catholic church or

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chapel. He believed that the disclosure of these facts would affect the price, and feared that it might defeat the sale. He had previously been informed by the plaintiff that the land would not be sold except to be occupied by a nice dwelling house to be used as a residence. He informed the plaintiff that his customer was a married man whose family consisted of a wife and two children, that he was employed by the New York, New Haven, and Hartford Railroad Company in a high position, at a salary which he estimated to be at least $6,000 per year, that he was amply able to build and occupy a nice dwelling house, and said, "I will guarantee it is as good a house as yours or the next one above." The house next above is the dwelling house of Mr. Earp. The deed was made to the agent, and two days later the agent made a conveyance to his principal, the defendant corporation, which speedily made a contract for the construction of a cellar for a chapel to be erected upon the lot, designed to seat four hundred and ninety-two persons. The judge found that the erection of such a chapel would greatly diminish the value of the plaintiff's property.

Without considering the representations which were promissory, there is enough to show that a gross fraud was practised upon the plaintiff. A Roman Catholic corporation which was an owner and builder of churches, was a very different party in reference to the ownership and probable use of a lot of land, from a man with a small family, employed in a high position, at a large salary by a great corporation. In determining whether to make a sale, the plaintiff might be glad to sell to the latter because of the probability that he would put the land to a use which would increase the value of the plaintiff's other property, and be entirely unwilling to sell to the former because of the probability that it would put the land to a use which would greatly diminish the value of his estate. A statement as to the position or character of the purchaser was a statement of an existing, material fact, in reference to which an intentional falsehood, if relied upon, would be an actionable fraud.

There can be no doubt that it is within the scope of the apparent authority of a purchasing agent to give the name of the purchaser, or to make other statements which will show to what class he belongs, and if he fraudulently represents him to be the

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head of a family seeking a home, when in fact the buyer is a corporation seeking a site for a factory or a church, his principal must take the consequences of his fraud.

The fact that the legal title to the lot was held by a third person for the plaintiff's benefit, is immaterial. The plaintiff was the real owner, he conducted the negotiations for himself, and his rights as against these defendants, except as to the party who is to bring the suit, are the same as if he had been the holder of the legal title. The fraud as to the kind of purchaser to whom the plaintiff was selling is independent of the provisions of the deed in regard to restrictions, and is not affected by them. Nor are the rights of the plaintiff diminished by the fact that he paid a part of the commission of the purchaser's agent. It is found that in the matters relied on by the plaintiff, the agent was acting for the defendant corporation, although the corporation was ignorant of his fraud.

Decree for the plaintiff.

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CHARLES P. SUMNER *vs.* JOHN D. GARDINER & others.
ARTHUR D. SUMNER *vs.* SAME.

Essex. November 5, 1903. — November 25, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, LORING, & BRALEY, JJ.

Partnership. Evidence, Competency, Admissions.

To show that the defendants in an action of contract for goods sold and delivered were partners of a certain firm to which the plaintiff had sold the goods, postal cards and a letter received by the plaintiff representing the defendants as members of the partnership were held to have been admitted in evidence rightly, having been found by the jury to have been issued and written in the usual course of business and by authority of the defendants.

A failure to reply to a statement which if true calls for denial is evidence that the person maintaining silence admitted the truth of the statement.

In an action of contract against several defendants as members of a partnership, the plaintiff, in order to show that one of the defendants was a member of the partnership, may testify that he made a statement to this defendant that he understood that this defendant was a member of the partnership and that he had brought his action to prove it, and that the defendant made no reply.

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TWO ACTIONS OF CONTRACT, one by Charles P. Sumner and the other by Arthur D. Sumner both against John D. Gardiner and George R. Beardsell, of Lynn, and Charles A. Ford who was made a defendant by amendment, as copartners doing business under the name of the Boston Shoe Stock Company, for certain sums alleged to be due to the respective plaintiffs for goods sold and delivered according to accounts annexed. Writs dated September 13, 1897.

No service of the writs was made upon Ford, but he voluntarily came into court, and filed a suggestion of bankruptcy and his discharge therein.

The cases were tried together before *Wait*, J. The plaintiffs requested the judge to default the defendant Ford for failure to answer interrogatories filed by the plaintiffs, and for want of an answer to the plaintiffs' declarations. As to this the judge reserved his decision, and the cases proceeded to trial against Gardiner and Beardsell only.

The plaintiffs throughout the trial contended that, before and at the time the goods mentioned in the plaintiffs' declarations were sold, a partnership had been formed and existed between Ford and the other defendants under the name of the Boston Shoe Stock Company, or that Ford and the other defendants had held themselves out as copartners in the business of the Shoe Stock Company, or that Gardiner and Beardsell were the principals and Ford the agent in the business.

The defendants Gardiner and Beardsell denied that any such copartnership had ever been formed, or that they had ever held themselves out as copartners with Ford, or that he ever had acted as their agent.

The two postal cards and a letter, sufficiently described in the opinion, were offered in evidence by the plaintiffs and were admitted by the judge against the objection of the defendants.

The jury returned a verdict for the plaintiff Charles P. Sumner in the sum of $1,249.05, and a verdict for the plaintiff Arthur D. Sumner in the sum of $866.85. The defendants Gardiner and Beardsell alleged exceptions.

W. H. Niles, for the defendants Gardiner and Beardsell.

M. A. Pingree, for the plaintiffs.

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BRALEY, J. It was necessary for the plaintiffs to prove that a copartnership existed between the defendants as alleged in their writs, and that at the time the debts sued upon were contracted the defendants were doing business as the Boston Shoe Stock Company.

As tending to support this allegation they offered in evidence and the judge admitted two postal cards containing among other things a statement from which it might be inferred that the defendants Gardiner and Beardsell either composed the company or were connected with it.

Bearing on the relation of the defendant Gardiner to the contract declared on, a letter was also put in evidence written by the defendant Ford, in which Gardiner was represented as a member of the firm of Gardiner and McManus, to which Gardiner and Beardsell were represented as successors.

The only question raised is whether there was any evidence connecting the defendants with the postal cards and letter. The order in which the proof was introduced is wholly immaterial and there was evidence both circumstantial and direct from which a jury might find that the defendants Gardiner and Beardsell were doing business as Gardiner, Beardsell and Company in manufacturing the "Hatch Counter"; that the Boston Shoe Stock Company sold this counter, and that the defendant Gardiner was frequently at the office on Summer Street and subsequently at the one on Lincoln Street at each of which places the Boston Shoe Stock Company and Gardiner, Beardsell and Company purported to be carrying on business. Signs were put up at each place showing in connection the names of Gardiner, Beardsell and Company and Boston Shoe Stock Company.

The evidence of the plaintiff Arthur B. Sumner was to the effect that prior to the order given to his firm a postal card had been received by him which was like one of those admitted in evidence stating that "Gardiner, Beardsell & Co., Successors to Gardiner & McManus . . . Men's Department, Boston Shoe Stock Co.," were to be found at "135 Summer Street, Boston. C. A. Ford, Manager." He called there at the time he obtained the order and found the defendant Gardiner "sitting at the desk of the Boston Shoe Stock Company" and had some talk with him about selling the counters which the plaintiffs were engaged

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in making, and during that talk the defendant Gardiner told him "that he was running the men's department of the Boston Shoe Stock Company, that he was behind it," and also "that Gardiner and Beardsell was behind the Boston Shoe Stock Company in the men's department, and that I should get my pay for these goods." After this conversation he received the letter written by Mr. Ford and another postal card similar to that admitted at the trial announcing the removal of Gardiner, Beardsell and Company and the Boston Shoe Stock Company from Summer Street to Lincoln Street.

This evidence tended clearly to show that the defendant Gardiner at least was doing business as claimed by the plaintiffs, and that after the order had been given to make the counters Ford wrote the letter admitted in evidence and for aught that appears from the bill of exceptions must have obtained this information from Gardiner and it may fairly be inferred that the letter was written by his direction.

It is argued by the defendants that even if the postal cards and letter are competent as admissions made by Gardiner they should not be received as evidence against the defendant Beardsell. But George W. Folger, a witness called by the plaintiffs, among other things, testified in substance, that he was in the employment of Gardiner, Beardsell and Company and was present when Charles P. Sumner, one of the plaintiffs, met the defendant Beardsell and introduced them to each other, and at that time a conversation took place between them. "Mr. Beardsell says, 'how do you do, I have heard of you before.'" To which Mr. Sumner said "I didn't connect you in any way, shape, or manner with the Boston Shoe Stock Company. I understand from Mr. Ford that you are connected, and I had no other way to prove it but by bringing suit." To this assertion Beardsell made no reply. It would be open for a jury to say whether under all the circumstances, a suit having been brought in which it was alleged that he was a partner of Gardiner and that they were doing business as the Boston Shoe Stock Company and his attention being called by one of the plaintiffs to this contention and the direct statement made to him that he was connected with the company, he was called upon to deny the statement if such was not the fact. And his failure to make

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any denial where naturally it would be expected, might cause his silence to be construed as an admission by him of the truth of the allegation. *Commonwealth* v. *O'Brien*, 179 Mass. 533, 534.

Under the instructions which carefully guarded the rights of the defendants, the jury by their verdicts must have found that the postal cards were issued and the letter written in the usual course of business and by the authority of the defendants.

Exceptions overruled.

REED S. WILLIAMS, administrator, *vs.* CITIZENS' ELECTRIC STREET RAILWAY COMPANY.

Essex. November 5, 1903. — November 25, 1903.

Present: KNOWLTON, C. J., MORTON, BARKER, LORING, & BRALEY, JJ.

Practice, Civil, Exceptions. *Negligence*, On street railway. *Evidence*, Remoteness.

In an action against a street railway company, in which the plaintiff contends that his intestate had his finger injured owing to an improper device for opening and shutting the door of the vestibule of an electric car, after a verdict has been ordered for the defendant and the plaintiff has alleged exceptions, it cannot be assumed in favor of the plaintiff that an inspection of the car by the jury added anything to the evidence stated in his bill of exceptions.

In an action against a street railway company for injuries resulting in the death of the plaintiff's intestate who fell from the rear vestibule platform of an electric car of the defendant, the plaintiff contended that, owing to the improper construction of the door of the vestibule, the intestate in opening the door pinched a finger of his left hand which had previously been injured and that the pain in his finger caused him to faint and fall from the car. The testimony of the only witness who saw him open the door tended to show that he used his right hand in sliding it open, and there was no evidence that his left hand came in contact with it. There was nothing to show that he fainted or, if he did, what was the cause of his fainting. *Held*, that a verdict rightly was ordered for the defendant, the plaintiff's case being founded wholly on conjecture.

In an action against a street railway company, in which the plaintiff contended that his intestate had his finger pinched in the sliding door of the vestibule of an electric car of the defendant, owing to improper appliances for opening and shutting the door, the presiding judge excluded a question by the plaintiff as to whether a witness observed any difficulty in starting the door open from the outside in this car or one like it. *Held*, that the evidence was excluded rightly, as on the evidence in the case there was nothing to show that the injury to the intestate's finger was caused by any difficulty in starting the door open, and also because the door of another car like this might stick and open with difficulty and the door of this car move freely.

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TORT for injuries to the plaintiff's intestate, a passenger on an electric car of the defendant, resulting in his death after conscious suffering. Writ dated October 29, 1901.

In the Superior Court *Lawton*, J. ruled that the plaintiff was not entitled to recover, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

A. P. White, for the plaintiff.

W. H. Hitchcock, for the defendant.

KNOWLTON, C. J. On the morning of November 4, 1900, about half an hour after midnight, the plaintiff's intestate, while riding on the rear platform of one of the defendant's cars, fell off and was killed. The theory of the plaintiff is that the patented device for opening and shutting the sliding door of the vestibule of the car was improper and unsafe, because in opening the door from the outside one must insert his fingers into a metallic slot sunk into the wood of the side of the door, near the main part of the car with which the door came in contact when it was closed, and that when the door was opened it slid in such a way that the outer edges of the metallic slot, being sharp and rectangular, came in close proximity with the inner corner of the door post towards which the door slid, the door sliding from the main part of the car into the grooved end of the vestibule; that the plaintiff, who had previously injured the third finger of his left hand, so that it was then sensitive and tender, injured his finger again by reason of the improper device, while opening the door, and that sometime afterwards, while riding in the vestibule, he fainted because of the condition of his finger, and fell off.

It is a grave question whether the bill of exceptions shows any evidence which would warrant the jury in finding the device for opening and shutting the door to be improper, so that the use of it by the defendant would constitute negligence. We cannot assume in favor of the excepting party that the inspection of the car by the jury added anything to the evidence stated in the bill of exceptions.

But if it were found that the metallic slot exposed those who opened the door to the risk of getting their fingers bruised against the corner of the door post when the door was slid back as far as possible, there is no proof in this case that the plaintiff's intes-

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tate hurt his finger in this way. We have testimony of his declaration that he jammed his finger in the door, but he said nothing as to how he happened to jam it. The testimony of the only witness who saw him open the door tends to show that he used his right hand in sliding the door open, and there is no testimony that the fingers of his left hand came in contact with the sunken metallic slot complained of. There is nothing better than conjecture on which to rest this part of the plaintiff's case.

Proof is also wanting to support the contention that the injury to the finger was the cause of his falling from the car. There is a possibility that pain in his finger caused him to faint, but there is no evidence that tends to show that he fell from this cause to the exclusion of other causes. He might have fallen from weariness, or sleepiness, or from some effect of six or eight glasses of ale which the testimony shows that he had drunk that evening, or from apoplexy, or from his own carelessness. There is nothing to show that he fainted, and if he did faint, it is not shown that the faintness was caused by an injury to his finger. The jury would not have been warranted in finding that his fall was caused by the injury to his finger; possibly it was, but other theories and conjectures are quite as probable.

It is not contended that there was evidence of any other negligence on the part of the defendant, and in the view we have taken there is no occasion to consider whether the jury might have found that the plaintiff was in the exercise of due care.

The question as to whether a witness observed any difficulty in starting the door open from the outside in this car or one like it, was incompetent. There is nothing to show that the injury to the intestate's finger on his left hand was caused by any difficulty in starting the door open; moreover, the door of another car like this might stick and open with difficulty, when the door of this car might move freely.

Exceptions overruled.

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CLARENCE W. BARRON *vs.* INTERNATIONAL TRUST COMPANY.

Suffolk. November 9, 1903. — November 25, 1903.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Contract, Performance and breach. *Evidence*, Burden of proof.

The defendant, a trust company, having underwritten a subscription for certain bonds of a company to be formed by a combination of corporations, agreed to pay the plaintiff for advertising the bonds in certain newspapers out of such money, securities or subscriptions as might be paid in. After the plaintiff had begun the advertising, the defendant obtained subscriptions for some of the bonds, on which a payment of ten per cent was made; but the defendant, finding that misrepresentations had been made as to the earning capacity of at least one of the combining corporations, cancelled its underwriting contract and returned to the subscribers the amounts respectively paid by them, without paying the plaintiff's bill. *Held*, that the defendant never received any money out of which the plaintiff's claim was payable, as, when the undertaking failed and no bonds were to be issued, the money received for the proposed issue of bonds belonged to the subscribers and the defendant rightly returned it to them.

There is a presumption of fact that men act honestly, and when fraud is invoked it must be alleged and proved affirmatively by the party who relies upon it.

CONTRACT for the price of certain advertising alleged to have been done by the plaintiff for the defendant. Writ in the Supreme Judicial Court dated May 14, 1900.

The case was tried before *Loring*, J., who at the close of the plaintiff's evidence ordered a verdict for the defendant. The plaintiff alleged exceptions.

S. L. Whipple, for the plaintiff.

R. M. Morse, for the defendant.

BRALEY, J. This is an action of contract in which the plaintiff seeks to recover for money paid by him in advertising in certain newspapers a proposed subscription for and sale of mortgage bonds to be issued by a corporation known as the Boston Breweries Company of which the defendant was to be trustee for the bondholders. The declaration contained three counts, but the first and second become immaterial as the case was tried on the third count, which in substance alleges that the defendant being "interested in the promotion of a combination of corporations" desired to place the bonds on the market, and agreed with

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and promised the plaintiff that if he would advertise the enterprise in certain newspapers it would pay him out of "such money or securities as might be paid to it, or such subscriptions as might be made thereafter to said securities", and that subscriptions were made to the bonds and money paid on account thereon to the defendant, who has failed and neglected to pay the plaintiff. After the plaintiff had begun to advertise the securities, the defendant under the terms of the agreement between it and the Boston Breweries Company obtained subscriptions for the bonds to the amount of $60,000, on which the several subscribers therefor paid ten per cent on a par value of $100 for each bond, and in this way the defendant received the sum of $6,300. For reasons not necessary to be stated the undertaking did not prove financially successful. No trust deed was ever executed or delivered to the International Trust Company, neither were any bonds prepared and engraved and "the subscription was a failure." The underwriting agreement was cancelled by the defendant on the ground of "misrepresentations in the prospectus." These misrepresentations related particularly to the earning capacity of the different breweries, it being claimed that the amount of the entire earnings had been greatly overstated. After the cancellation of the agreement the money which had been paid to the defendant on account of subscriptions to the bonds was returned by it to the several subscribers. A verdict having been returned for the defendant by order of the presiding justice, the case is here on exceptions to this ruling, by the plaintiff, as well as to the admission of certain evidence at the trial.

The questions raised are so closely connected that they may be considered together. The relation of the parties to this suit is well stated in the closing language of the interview between the plaintiff and the president of the defendant when the contract was made. "I said, 'If the money comes in you will pay me.' 'Certainly,' he said, 'I will pay you out of the money that comes in but I do not guarantee that any money will come in.' I said, 'That is satisfactory to me.'" Plainly no promise was made by the defendant to pay the plaintiff absolutely but only on condition that payment was to be made out of such money, securities or subscriptions as might be paid in, and the plaintiff

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now contends that as the defendant received an amount sufficient at least to pay his claim it is liable therefor. And if nothing further appeared this would be so. But the evidence offered by the defendant to show why the scheme failed was competent; and it cannot be successfully contended that upon the plaintiff showing that it had received the money the defendant is precluded from proving the cancellation of the underwriting agreement and abandonment of the undertaking, and thereby show that the condition under which the plaintiff could lawfully call upon it to pay had not arisen. All the parties who took part in the negotiations to put the enterprise through as well as the plaintiff who was fully informed of the relation of the defendant thereto must have understood that they were dealing with a combination whereby customers were to be secured for the bonds to be put on the market and that these bonds were to be prepared and issued in the usual way. When the final result of the subscription to the bonds was ascertained and the securities successfully floated, and not before, the promise to pay out of the money received therefrom would arise and become operative.

The money actually received was paid in by subscribers on the direct understanding that the whole undertaking would be consummated as represented; and it fairly may be inferred that none of those who subscribed would have done so on any other basis. When the defendant, ascertaining that misrepresentations had been made as to the earning capacity of at least one if not more of the various concerns which made up the Boston Breweries Company, refused to go on, and so notified the agent of the proposed combination, and cancelled the underwriting agreement, the money in its possession, received from subscribers for bonds that had not been and could not be issued, belonged to those who had paid it. They subscribed for bonds, and no bonds were ever sold and delivered, for the simple reason that the proposed combination went to pieces and there were no bonds to sell. And the object and purpose of the subscription having wholly failed, each was entitled to a return of the sum so paid. The temporary deposit made by subscribers was to insure good faith on their part and that they would take and pay for the bonds subscribed for by them, and cannot be regarded and treated as a fulfilment of all the conditions under which

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the subscriptions were made, because each subscription was conditional upon the whole amount being taken and issued, or at least enough to make the issue of bonds a success; and this view is in accordance with the terms of the offer made when they were placed on the market. It can make no difference whether the amount repaid is treated as a trust fund to be returned to those who paid it on the express understanding that bonds were to be issued therefor, or as money received on account which the defendant might mingle with its funds, and use for general business purposes. In either way it had received money which in equity and good conscience must be paid back, if the bonds could not be issued. *Kelly* v. *Beede*, 141 Mass. 184.

Nor can the force of this understanding, arising from the whole plan to float the bonds and the general situation of the parties and their relation to the subject matter, be successfully met by the argument of the plaintiff that a jury might find that the cancellation of the agreement by the International Trust Company was fraudulent as against the plaintiff and not made in good faith. It would be enough to dispose of the position taken to say that the declaration on which the plaintiff relies alleges performance of the contract, and not a breach of it by the defendant. But, if this had been cured by an amendment at the trial, the plaintiff must have failed to maintain his contention.

The evidence as to the cancellation of the underwriting agreement was given on cross-examination by the president of the defendant company, a witness called by the plaintiff, and against whom no claim was then, or is now made, that he was untruthful or under any bias or prejudice in the case. Not only is fraud never presumed, but it must be affirmatively alleged and proved by the party who relies upon it, either for the purpose of attack or defence. And nothing appears in the evidence recited in the record to show want of good faith by the defendant. If the plaintiff in order to avoid the effect of this evidence sought to charge the defendant or its officers with fraudulent conduct it became his duty to so allege and offer some affirmative proof to overcome the presumption of fact that they had acted honestly. *Hatch* v. *Bayley*, 12 Cush. 27, 30. *Beatty* v. *Fishel*, 100 Mass. 448. *Wood* v. *Massachusetts Mutual Accident Association*, 174 Mass. 217, 221.

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He failed so to do. And as the case stood at the close of the evidence the plaintiff had not proved that the defendant had received any money under the terms of the agreement declared on, and the verdict was ordered rightly in its favor.

Exceptions overruled.

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BURTON P. GRAY, trustee, *vs.* IRENE P. CHASE & others.

Suffolk. December 2, 1902. — November 25, 1903.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Equity Jurisdiction, Fraud. *Equity Pleading and Practice. Bankruptcy.*

In a suit in equity by a trustee in bankruptcy to set aside a conveyance by the bankrupt through a third person to his wife, the case for some reason not appearing on the record was sent to an auditor instead of a master. The auditor found that there was no evidence that the conveyance in question was made or accepted with any fraudulent intent or for the purpose of delaying or hindering creditors. It appeared by the auditor's report that when the conveyance was made the bankrupt was insolvent and heavily indebted and that the conveyance was without consideration. In the Superior Court the judge reached a conclusion opposite to that of the auditor and found that the conveyance was fraudulent as against creditors. *Held*, that on the facts reported this court could not say that the finding of the judge was wrong.

In a suit in equity by a trustee in bankruptcy to set aside a conveyance made by the bankrupt to a third person for the benefit of the bankrupt's wife, if it appears that the purpose of the conveyance was to prevent an attachment by a creditor who recently had obtained a judgment, a decree ordering a release of the conveyance may be warranted, although there is no direct evidence that the specific purpose of the conveyance was known at the time to the person to whom the conveyance was made.

In a suit in equity a decree may be made that each of two wrongdoers shall pay to the plaintiff the amount due to him by reason of the wrongful act in which they both took part, and in such case a payment by one discharges the other.

In a suit in equity by a trustee in bankruptcy to set aside a conveyance of an equity of redemption made by the bankrupt to a third person for the benefit of the bankrupt's wife, if it appears, that the conveyance was made without consideration in order to prevent an attachment of the property by a creditor of the bankrupt, and that the grantee made a paper in the nature of a lease to the bankrupt's wife, who continued to occupy the premises as she did before, paying interest on the mortgages, taxes and other expenses but no rent, the grantee may be held to account for the amount which he should have received as rent, and the bankrupt's wife also may be charged with the rent which she should have paid, having by the adjudication in bankruptcy become a tenant at sufferance of the trustee in whom the title to the property then vested.

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Under the bankruptcy act of 1898, § 70 *a*, the property of a bankrupt vests in the trustee from the date of the adjudication in bankruptcy. In a suit by a trustee in bankruptcy an accounting was ordered as to property of the bankrupt found to have been conveyed in fraud of creditors. The decree directed that the accounting should begin on a certain day, which was two days earlier than the date stated in the auditor's report as that of the adjudication in bankruptcy. *Held*, that while there might be an error of fact, the record did not disclose sufficient facts to show an error in law, or to enable the court to correct any error of fact.

In a suit in equity by a trustee in bankruptcy to set aside conveyances in fraud of creditors made by the bankrupt through a third person to his wife and to a third person for his wife's benefit, the suggestion of the death of the bankrupt filed in the case by his widow, one of the defendants, without further proceedings based upon it, does not bring before the court a claim of dower in the property in question.

In a suit in equity, where the defendants have appealed from a decree ordering them to account to the plaintiff for certain money claimed by him, and the plaintiff has not appealed, it is not open to the plaintiff to dispute credits allowed to the defendants by the decree.

LATHROP, J. This is a bill in equity brought by the trustee in bankruptcy of the estate of Nathaniel E. Chase, who was adjudicated a bankrupt on his own petition on April 3, 1900, to have the defendants Irene P. Chase and Edwin M. White ordered to deliver up certain conveyances and to release their rights in two parcels of land. There were other defendants who are not now parties to the suit.

The case was sent to an auditor, who made a report which was amended by leave of court, and there were several supplemental reports of the auditor. The controversy relates to two parcels of land in Boston, one, No. 4 Chestnut Street, and the other, formerly the rear part of the first parcel and now the rear of No. 9 Walnut Street. The auditor's report states many facts, some of which have now become immaterial. The material facts may be summarized thus. Nathaniel E. Chase bought the house numbered 4 Chestnut Street for the sum of $19,500, of which $16,500 was paid by a mortgage given by him to his vendor, and the remaining $3,000 was paid by a check of his wife's, she having money of her own. Subsequently Nathaniel E. Chase made several mortgages, all of which have been found to be valid. One of these, for $10,000, was to a third person who held it for the benefit of Mrs. Chase, on account of the $3,000 advanced by her for the purchase of the house and for other advances subsequently made.

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In this state of affairs, on December 16, 1897, the rear of the lot No. 4 Chestnut Street was conveyed by Nathaniel E. Chase to a third person who conveyed it to Mrs. Chase. Neither the third person nor Mrs. Chase paid any consideration for it. Mrs. Chase at this time had agreed to purchase the lot of land No. 9 Walnut Street, and desired to have the rear portion of the Chestnut Street lot, which adjoined the lot No. 9 Walnut Street, annexed to the latter estate. Releases were obtained from the holders of the first and second mortgages on the rear portion of the Chestnut Street lot, and two mortgages held by Mrs. Chase were cancelled (the $10,000 mortgage being afterwards given in their place). The parcel was then conveyed by Mr. Chase to one Reynolds, to whom the lot No. 9 Walnut Street was also conveyed by its owners. Reynolds conveyed the two parcels to Mrs. Chase, who thereupon gave a mortgage on the same to one Chamberlain for $16,000, which mortgage is still outstanding.

The auditor found that Mr. Chase received no consideration for his conveyance to Reynolds.

The auditor further found that there was no evidence that this conveyance was made by Mr. Chase or accepted by his wife with any fraudulent intent, or for the purpose of hindering or defrauding creditors.

On or about February 26, 1898, Mr. Chase conveyed his equity in the estate No. 4 Chestnut Street, subject to the mortgages thereon, then amounting to $25,000, to Edwin M. White, by a deed in which Mrs. Chase did not release dower. No consideration was paid for this conveyance, and the auditor has found that the property was not transferred in good faith, but to prevent its attachment by creditors of Mr. Chase. After this conveyance, a paper in the nature of a lease was made by White to Mrs. Chase, who has continued ever since to occupy the house as she did before, paying no rent, but paying interest on the mortgages, taxes, and other expenses of carrying the property.

The auditor further found that the real purpose of the conveyance to White was to prevent its attachment in a threatened suit by the executrix of an attorney at law who had a claim for professional services against Mr. Chase at the time the conveyance to White was made, but that there was no

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direct evidence that this specific purpose was known to White at the time.

In his supplemental report the auditor found that the actual rental value of the estate No. 4 Chestnut Street was $1,500. He also annexed a copy of the paper signed by White, dated March 25, 1898, in which he stated that he, as owner of the estate No. 4 Chestnut Street, accepted Mrs. Chase as his tenant at will, she to pay as rent the taxes levied or assessed on the premises, and the interest as it became due on three mortgages of $14,000, $1,000 and $10,000, which were secured on the premises, and all interest that should accrue upon said mortgages to the end of her tenancy, and to do all necessary repairs.

The case was then heard before the Chief Justice of the Superior Court upon the auditor's report, and certain exhibits and agreed facts which are unimportant. The Chief Justice made a memorandum of his findings, which was afterwards incorporated in an interlocutory decree, filed February 12, 1902. By the terms of this decree it was ordered that the defendant White should release to the plaintiff the premises described in the bill and known as No. 4 Chestnut Street, as conveyed to him by the deed of February 28, 1898, and that he make, execute and deliver to the plaintiff a deed of the same; that Mrs. Chase make, execute and deliver to the plaintiff a good and sufficient release of all her right, title and interest in the real estate conveyed to her by Charles D. Reynolds, being the original rear part of No. 4 Chestnut Street; that White account to the plaintiff for what should have been received for rent and use and occupation of the premises No. 4 Chestnut Street, at the rate of $1,500 a year from April 1, 1900, up to the present time, so far as the same is in excess of the sum actually paid by Mrs. Chase during that time for taxes, interest and necessary repairs on the estate; that Mrs. Chase account to the plaintiff for rent, use and occupation of the estate No. 4 Chestnut Street, at the rate of $1,500 a year from April 1, 1900, to the present time, less sums actually paid by her during that time for taxes; and that the cause be recommitted to the auditor to state the accounts between the parties and the amounts for which the defendants should severally be charged.

On March 5, 1902, the defendants appealed from this decree.

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On January 24, 1902, Mrs. Chase filed a paper suggesting the death of her husband, and stating that her right of dower was now vested. No action appears to have been taken on this suggestion, nor does the matter appear to have been called to the attention of the judge.

Subsequently the auditor filed a report under the interlocutory decree, and this was not considered by the court as satisfactory. The case was recommitted to the auditor, who found a balance due from Mrs. Chase of $869.29, being the difference between the rent due from her and the interest paid on the first and second mortgages, taxes and repairs. He also found that Mr. White was liable for the same amount based on the same figures. The case was again heard and a final decree was entered, by which, "in addition to said interlocutory decree of February 12, 1902," the defendants Mrs. Chase and Mr. White were severally ordered to pay the sum of $869.29, with costs, within thirty days. From this decree the defendants appealed.

Why an auditor instead of a master was appointed in this case there is nothing in the record to show, and it may be that technically his report should be treated as that of a master, *Falmouth* v. *Falmouth Water Co.* 180 Mass. 325, and that, so treated, nothing is open unless an exception in regard to it is filed to the report. *Popple* v. *Day*, 123 Mass. 520. *Roosa* v. *Davis*, 175 Mass. 117. It appears from the memorandum of the Chief Justice of the Superior Court that there were exceptions filed to the first report, which were waived. No other exceptions appear to have been filed, nor were any requests for rulings made.

But as the sending of the case to an auditor instead of a master was the act of the court and not of the parties, we are disposed to treat the case more liberally, and to decide it upon its merits, though we do not intend to have our action in so doing considered as a precedent for the future.

1. The first question arises in regard to the parcel of land at the rear of No. 4 Chestnut Street, which was annexed to the Walnut Street estate, and which was conveyed by Mr. Chase to his wife through a third person. The auditor has found that Mr. Chase received no consideration for the conveyance, but that there was no evidence that this conveyance was made by him or accepted by her with any actually fraudulent intent, or

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for the purpose of delaying or hindering creditors. This finding of the auditor was not followed by the Chief Justice of the Superior Court. In *Livingston* v. *Hammond*, 162 Mass. 375, 376, where a case was heard by a judge of the Superior Court without a jury, and the only evidence was an auditor's report, it was said by Mr. Justice Knowlton: "The judge was not obliged to accept the conclusions of the auditor upon the facts stated in the report, but might consider all the facts in their relation to one another, and draw any proper inferences from them and reach any conclusion that they would warrant."

In the case before us Mr. Chase was insolvent and had been so for many years. The conveyance was without consideration, and he was heavily indebted. The auditor drew the inference that the conveyance was not to delay and defraud creditors. The Chief Justice of the Superior Court drew the opposite inference, and we cannot say on a review of the facts that he was wrong.

The husband received no advantage from the conveyance. His indebtedness was not diminished, and he received nothing. His wife gave him nothing, and suffered nothing, and incurred no liability as a consideration for his transfer. Her arrangements with third persons to make her husband's conveyance more valuable to her has nothing to do with the subject of consideration between her husband as grantor and herself as grantee. The case therefore falls within the ordinary rule, that one who is deeply in debt, and especially when he is insolvent, and who makes a voluntary conveyance which takes property away from his creditors, is presumed to intend the natural consequences of his act, which is to hinder and delay his creditors. The effect of the transaction was to put the lot into the wife's hands, and to leave the indebtedness unpaid, the mortgage debts with less security, and two other debts with no security.

2. The next question relates to the transfer of the equity of redemption by Mr. Chase to the defendant White, of the property No. 4 Chestnut Street. The auditor has found that the real purpose of the conveyance was to prevent the attachment by the executrix of a creditor on whose claim judgment had been obtained. The fact found by the auditor that there was no direct evidence that the specific purpose of the conveyance

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was known at the time to White was immaterial. He was not a *bona fide* purchaser for value, and there is enough in the report to warrant the Chief Justice of the Superior Court in directing a release of this equity from White.

3. The next question relates to the accounts. The defendants contend that the final decree imposes a double liability upon White and Mrs. Chase for $869.29, — that is that each must pay this amount, — and is wrong; but we do not understand that this is the meaning and effect of the decree. The judge of the Superior Court evidently considered both as wrongdoers, and ordered a decree against both, but as in an action at law against two wrongdoers satisfaction of a judgment against one is all that the plaintiff is entitled to, (*Corey* v. *Havener*, 182 Mass. 250,) so in equity a payment by one would discharge the other.

4. The principal objection raised by the defendants on the accounts is in charging White with the amount which he should have received as rent and for use and occupation of the estate from April 1, 1900, to the date of the interlocutory decree, February 12, 1902. Treating White as a fraudulent grantee, there can be no doubt that he should be held liable. He was a mere volunteer, and a wrongdoer, and should be held to account for all which might have been made from the premises. 1 Story, Eq. Jur. (12th ed.) 514 *a*. See also *Hubbell* v. *Currier*, 10 Allen, 333; *Jones* v. *Reeder*, 22 Ind. 111; *Thompson* v. *Bickford*, 19 Minn. 17; *Hack* v. *Norris*, 46 Mich. 587.

Treating Mrs. Chase as a fraudulent grantee we see no reason why she also should not be charged with the rent which she should have paid. By the adjudication in bankruptcy, the title to the property vested in the trustee, the lease from White to her ceased, and she became a tenant at sufferance of the trustee. See *Bunton* v. *Richardson*, 10 Allen, 260.

5. The memorandum of the Chief Justice of the Superior Court directed the accounting to begin from the adjudication in bankruptcy of Chase. It is stated in the auditor's report that Chase was adjudicated a bankrupt on his own petition April 3, 1900. The interlocutory decree of February 12, 1902, directed the accounting to begin from April 1, 1900, and the accounting was so made. There would seem to be some error in

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the date stated by the auditor, or it may be that it appeared, when the interlocutory degree was signed, that the petition was filed by Chase on April 1, and that that was taken as the date on which the accounting was to begin. Two of the clauses of § 70 *a* of the bankruptcy law of 1898 read as follows: "The trustee of the estate of a bankrupt, upon his appointment and qualification, . . . shall . . . be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt," and "property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." It is generally considered that the first clause refers to the date when the property passes, and that the latter clause refers to what passes. *In re Harris*, 2 Am. Bankr. R. 359. *In re Barrow*, 3 Am. Bankr. R. 414, and 98 Fed. Rep. 582. *In re Pease*, 4 Am. Bankr. R. 578. *In re Burka*, 5 Am. Bankr. R. 12, and 104 Fed. Rep. 326. *In re Elmira Steel Co.* 5 Am. Bankr. R. 484, and 109 Fed. Rep. 456. Collier on Bankruptcy, (3d ed.) 456; (4th ed.) 510, and cases cited. Lowell on Bankruptcy, 508.

While there may be some error of fact on this point in the case before us, enough does not appear to show that there was any error of law, or to enable us to correct any error of fact.

6. It is argued that pending the litigation Mr. Chase has died, and Mrs. Chase is now, as against the plaintiff, entitled to dower in the premises. There was a suggestion of his death filed in the Superior Court, but it does not appear that anything more was done. There was no amendment of the answer of Mrs. Chase, nor does it appear that the matter was in any way called to the attention of the court. It is settled that a suggestion of insolvency or bankruptcy is not enough. *Dunbar* v. *Baker*, 104 Mass. 211. *Holland* v. *Martin*, 123 Mass. 278. *Dalton-Ingersoll Co.* v. *Fiske*, 175 Mass. 15. The same rule applies to the death of a party. *Reid* v. *Holmes*, 127 Mass. 326. Furthermore, nothing appears to have been done in relation to Mrs. Chase's dower, and we are not called upon to determine whether Mrs. Chase is entitled to dower as against the plaintiff. Such a question is not properly before us.

7. There are several other points taken in the defendants' brief, but none of them seems to require consideration.

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8. The plaintiff did not appeal, but contends that no credit whatever should have been allowed the defendants. We are of opinion that this point is not open to him. It was open to him to contest any point made by the defendants on their appeal, but beyond that he could not go unless he also appealed.

Decree affirmed.

H. J. Jaquith, for the defendants.

R. D. Ware, for the plaintiff.

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JOHN McKENZIE *vs.* CHARLES S. GLEASON.

Plymouth. June 17, 1903. — January 4, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND, LORING, & BRALEY, JJ.

Deed. Boundary. Way. Practice, Civil, Exceptions.

A boundary in a deed running from "a stake and stones near an old road leading to the shore; thence by said road . . . to a stake by a pair of bars", where the road was over land of the grantor and the use of such a way was required for the reasonable enjoyment of the land conveyed, was held to include the fee to the centre of the road, and also a right of way to the grantee in common with others over the whole road.

A boundary in a deed by the nearer side line of a road over land of the grantor excludes the road, and the grantor is not estopped to deny its existence.

By a deed of land bounding on a private road over land of the grantor, the grantor is estopped to deny the existence of the road, and the grantee acquires a right of way through the entire length and width of the road as it existed upon the land of the grantor when the deed was given.

No exception lies to an erroneous instruction which could not have harmed the excepting party.

In an action of tort for the obstruction by a fence of a road over which the plaintiff claims a right of way, where by the bill of exceptions it is agreed, that if the plaintiff had a right of way over the road, the fence constituted such an obstruction of it as to support the declaration, it is not open to the defendant to contend that the plaintiff's evidence showed the building of a fence across the road at a point not included in the description of the road in the declaration.

TORT, with four counts, the first two for malicious prosecution, the third for the obstruction of a way, and the fourth for trespass upon the plaintiff's close at Wareham. Writ dated July 24, 1901.

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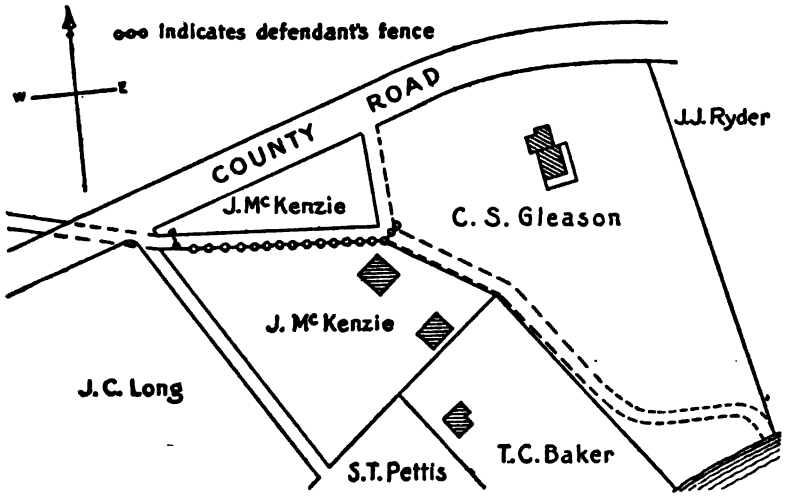
At the trial in the Superior Court before *Bell*, J., the plaintiff elected to proceed to trial upon the first, third and fourth counts.

The following is taken from a plan used at the trial and at the argument, the land of the plaintiff and the defendant being marked "J. McKenzie" and "C. S. Gleason" respectively:



The premises of the plaintiff and the defendant were owned by one Francis Dana at the time of his death on July 5, 1876. By his will, proved on August 28, 1876, the real estate of Francis Dana was conveyed to his wife, Eliza J. Dana. On May 20, 1885, Eliza J. Dana conveyed to the plaintiff certain premises conveyed to her by the will of her husband, described as follows: "A certain piece or parcel of land situated in that part of Wareham called Long Neck and adjoining a houselot of Thaddeus C. Baker, and bounded as follows: Beginning at the easterly corner of said Baker's lot, and running South 40° West, fourteen rods to a cedar post; thence North 85 1-4° West sixteen rods to a stake and stones near an old road leading to the shore; thence by said road North 88 3-4° East thirteen rods to a stake by a pair of bars; thence South 60 1-2° East seven rods to bound first mentioned: containing one hundred and fifty rods more or less." This was the plaintiff's south lot.

Eliza J. Dana died on January 15, 1889, still retaining the

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premises to the north and northeast of the premises conveyed to the plaintiff.

Under her will, and by virtue of releases from the other heirs, the premises adjoining the last described premises of the plaintiff on the north and northeast became the property of one Israel Wixon. On March 17, 1900, Israel Wixon executed to the plaintiff a deed of the triangular piece of land north of the premises conveyed by the deed of May 20, 1885. The description contained in the deed of March 17, 1900, was as follows: "A certain lot of land situated in that part of said Wareham called Long Neck and on the southerly side of the state highway, and is bounded as follows: Beginning at a stake at the northeast corner of said lot and the northwest corner of a private road used by Thaddeus C. Baker and on the southerly side line of the state highway: thence running south 69° West by the southerly side line of the state highway two hundred and twenty feet to a stake at the easterly side of a private road; thence South 11° 45′ East by said private road six feet; thence South 81° 30′ East by the northerly side of said private road forty-six feet; thence due east also by the northerly side of said private road one hundred and seventy-three and 5-10 feet to the westerly side of the private road first mentioned used by Thaddeus C. Baker aforesaid; thence North 9° West by the westerly side of said private road ninety-two and 5-10 feet to the first mentioned bound. Containing forty-one square rods more or less." This is called in the opinion the plaintiff's second lot.

On April 30, 1900, the premises marked on the plan "C. S. Gleason," which, after the death of Francis Dana, had been owned and occupied by Eliza J. Dana or her assigns, were conveyed by Israel Wixon to the defendant.

The plaintiff contended and asked the judge to rule that the plaintiff, under his deed of May 20, 1885, became entitled to the southerly half of the old road to the shore adjoining his premises; and that the language of the deed carried the northerly line of the premises conveyed by that deed to the central line of the road. The judge ruled as requested, and the defendant excepted.

There was evidence, which was not contradicted, tending to show that the road in question on May 20, 1885, existed in sub-

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stantially the same form as shown on the plan. The obstruction of the way, relied upon to support the third count, consisted in the defendant's putting a wire fence, as indicated on the plan, across the road at a point near the southwesterly corner of the triangular piece conveyed to the plaintiff by Israel Wixon on March 17, 1900, and also along the south side of the alleged way, against what the defendant contended was the north line of the plaintiff's south lot, entirely cutting off the plaintiff from the road.

The plaintiff testified that he had used the road over its entire length as shown on the plan for carting fish and oysters, constantly since the date of his deed of May 20, 1885, until the defendant closed the way, and that he had seen others do so.

At the close of the defendant's case the judge expressed some uncertainty as to the extent of the plaintiff's claim to the use of the road and his contention as to what obstruction had been caused by the defendant. The plaintiff's counsel contended that the evidence showed that the road had existed substantially as shown on the plan before and since May 20, 1885, that the plaintiff had used the entire length of the road as shown on the plan since that time, and that such use was beneficial to his business of an oysterman and keeper of a boarding house for summer boarders. The judge permitted the plaintiff to show on rebuttal that the acts of the defendant in interrupting the plaintiff's use of the road included placing a fence across the road at two points, (1) near the junction of the road with the State road, (2) at a point near the southeasterly corner of the land conveyed to the plaintiff by the deed of March 17, 1900, and that the second fence was still standing as an obstruction of the way at the date of the trial.

The judge refused to make certain rulings requested by the defendant, and the jury returned a verdict for the plaintiff on each of the three counts relied upon by him. The defendant alleged exceptions, raising the questions stated in the opinion.

The case was submitted on briefs at the sitting of the court in June, 1903, and afterwards was submitted on briefs to all the justices.

G. W. Stetson & H. LeB. Sampson, for the defendant.

H. H. Baker & C. F. Chamberlayne, for the plaintiff.

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BRALEY, J. The question presented for decision is, whether the plaintiff under the boundaries in his first deed acquired title to the southerly half of the way, and unless some imperative principle of law requires that the plaintiff cannot have any relief, a construction ought to be given to the deed which will not compel him to use his farm in parts, or exclude him from access to the county road.

The way is either included or excluded by the description in the deed. It cannot reasonably be held, under the language used, to be in part a monument, and in part merely descriptive for the purpose of identifying the line that runs "by the road" from stake to stake. If we exclude the road, the language used runs the line from stake to stake, following the general course of the road as shown on the plan, but in no instance extending beyond the original line so drawn, or in other words, the land of the plaintiff does not reach to or abut on the road. *Motley* v. *Sargent*, 119 Mass. 231, 235. The word "abuttal" means the same as boundary unless there are words that limit its meaning, and if the plaintiff abuts on the road, then he is bounded by the road, which is included. "The road is an abuttal, not a monument; and if the deed does not say on what side, it shall be taken to mean the centre." Shaw, C. J., in *Smith* v. *Slocomb*, 9 Gray, 36, 37. And the words "on the county road" and "by said road" have so been construed by this court. *O'Connell* v. *Bryant*, 121 Mass. 557. *Dean* v. *Lowell*, 135 Mass. 55, 60.

A grantee whose land is bounded by a way owned at the time by his grantor may acquire the right to use that way, not only because he gains a fee in half of it, but also, being so bounded his grantor would be estopped to deny the existence of the way. *Stark* v. *Coffin*, 105 Mass. 328, 330. In the description in the deed, if it were not for the use of the terms "stake and stones near an old road," and "stake by a pair of bars," no question could arise but that the way was included; and the true test is, what was the intention of the grantor under all the circumstances.

It was said in *Clark* v. *Parker*, 106 Mass. 554, 556, "In the construction of deeds, where lands are bounded on or by a way, either public or private, the law presumes it to be the intention of the grantor to convey the fee of the land to the centre of the way, if his title extends so far. This presumption is of course

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controlled, whenever there are words used in the description showing a different intention. But it has been held that giving measurement, in the deed, of side lines, which reach only to the outer line of the way, are not alone sufficient to overcome it."

The earlier cases were apparently in conflict with this rule of construction. "In some opinions of this court it has indeed been implied or asserted that a boundary upon a road or street passed no title in the land under it. But in the more recent decisions the general rule has been repeatedly declared, and must now be regarded as the settled law of the Commonwealth, overruling whatever is irreconcilable in the earlier cases, that a deed bounding land generally by a highway, with no restrictive or controlling words, conveys the grantor's title in the land to the middle of the highway." Gray, J., in *Boston* v. *Richardson*, 13 Allen, 146, 152; *Phillips* v. *Bowers*, 7 Gray, 21, 24. Compare *Crocker* v. *Cotting*, 166 Mass. 183, 187.

It is now too late to doubt the general rule as to boundaries by, or on, a street or way either public or private, which may be stated in the language used in *Peck* v. *Denniston*, 121 Mass. 17, 18, as follows: "The general rule is well settled that a boundary on a way, public or private, includes the soil to the centre of the way, if owned by the grantor, and that the way, thus referred to and understood, is a monument which controls courses and distances, unless the deed by explicit statement or necessary implication requires a different construction." Any argument that may be advanced by the defendant founded upon the fact that the side lines run in the first instance to a stake and stones near the way, and in the second from a stake near a pair of bars, and therefore the intention of the grantor was to exclude the way, must be considered with the further facts that after leaving the bars the boundary as shown on the plan still continues for an appreciable distance by the road to the starting point, which was a corner of land that bounded on the road. And if it was not the intention of Eliza J. Dana to grant to the plaintiff the use of the way, then she had sold a tract of land to the plaintiff to which he could not obtain access without becoming a trespasser, or else be forced to rely on a way by necessity over her remaining land. "The law presumes that one will not sell land to another without an understanding that the grantee shall have a legal right of

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access to it, if it is in the power of the grantor to give it, and it equally presumes an understanding of the parties that one selling a portion of his land shall have a legal right of access to the remainder over the part sold if he can reach it in no other way." *New York & New England Railroad* v. *Railroad Commissioners*, 162 Mass. 81, 83.

It is true that this language was used in considering a right of way arising from necessity, but it is equally applicable to the facts disclosed by this case. In the light of these circumstances the presumption is strong that the grantor did not intend such a result, and the operation of the rule is not to be controlled by a possible, but not reasonable construction, that the length of the side lines of the lot might exclude any part of the road. Under somewhat similar conditions a like conclusion was reached in principle, in the following cases: *White* v. *Godfrey*, 97 Mass. 472, 474, *Motley* v. *Sargent*, *O'Connell* v. *Bryant*, *Dean* v. *Lowell*, *ubi supra*, *Dodd* v. *Witt*, 139 Mass. 63, 65, and cases cited, *Gould* v. *Eastern Railroad*, 142 Mass. 85, 89, *Chadwick* v. *Davis*, 143 Mass. 7, 9, *Kelley* v. *Saltmarsh*, 146 Mass. 585, *Lemay* v. *Furtado*, 182 Mass. 280.

A majority of the court is of opinion that by his deed the plaintiff took in fee to the centre of the road, with a right of way over the north half; while the half belonging to him was subject to a like easement on the part of others having a right to enter upon and use the way. *Boland* v. *St. John's Schools*, 163 Mass. 229, 236, and cases cited.

For reasons already stated, the description in the deed of the second lot, which is bounded in part by the county road and on its southerly side by the northerly line of the private road, gives the plaintiff no title to any part of the way, as the boundary is expressly limited to its side line. The road evidently was referred to for the purpose of description only, and the deed cannot fairly be held to import a grant of anything beyond the boundary named. It was clearly the intention of the grantor that the way was to be excluded. The plaintiff, however, does not rest his case solely upon the ground discussed; but also claims that by the description in each deed, whether bounded by the side of the road or by the way itself, he gained an easement in the road as it then was for the purpose of travel,

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either on foot or by carriage throughout its entire length and width as it existed at the date of his deeds. The instructions of the presiding judge at the trial adopted this view. By the description of the second lot the road was excluded, and the defendant was not estopped to deny its existence.

But as to the first lot this position is well taken on the evidence and is amply supported by our decisions. There was an implied covenant that the road was in existence, and it must be held to have passed as appurtenant to the plaintiff's estate. *Parker* v. *Smith*, 17 Mass. 413. *Stark* v. *Coffin*, *ubi supra*. *Tobey* v. *Taunton*, 119 Mass. 404, 410. *Lemay* v. *Furtado*, *ubi supra*, and cases cited.* If the plaintiff had a right to use the way in connection with this lot, any obstruction of it by the defendant which prevented or obstructed such use was a trespass, and he is not harmed by the error in the instructions.

There remains to be considered the question of pleading. The third and fourth counts described the plaintiff's close as an entire estate without reference to the way, and the alleged acts of trespass by the defendant are its obstruction by the fence, the cutting down of a shade tree, and disturbance of the soil by digging post holes for the setting of the fence, which was all within the south half of the way that passed to the plaintiff under his deed. The third count describes the way as leading from the county road to the plaintiff's land, and it is now contended by the defendant that under this allegation the plaintiff is limited in his proof of the alleged tortious acts to this description, and that the building of the fence across the way at the point where it first enters upon the defendant's homestead is not within the allegation. But the allegation is to be treated as a description of the way for the purpose of identification and must have been so understood, as it is immediately followed by the words "and the defendant erected a fence at two places on the same, so that the plaintiff could not use the same."

The answer to this contention, however, is that it appears from the bill of exceptions that "it is agreed that if the plaintiff does own the south half of the way, the tree was on his land, and the removal of it constituted a trespass, and that if the

* See also *Driscoll* v. *Smith*, *ante*, 221.

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plaintiff has a right of way over said road, the fence constituted such an obstruction of it as to support the third count."

The instructions of the presiding judge were undoubtedly predicated upon this agreement, which was broad enough to cover any obstruction of the way caused by the erection of the fence in any part of it; and they are not open to this criticism or exception of the defendant.

Exceptions overruled.

CITY OF WORCESTER *vs.* BOARD OF APPEAL IN TAX MATTERS.

Worcester. September 28, 1903. — January 5, 1904.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Tax. Corporation. Words, "Owners", "Person."

Shares of a domestic manufacturing corporation purchased by the corporation itself and held for its benefit by a trustee residing in a city of this Commonwealth, assuming that the shares are to be treated as outstanding, are not taxable either to the corporation or the trustee, and the city in which the trustee resides is not entitled under R. L. c. 14, § 61, to be paid by the Commonwealth any proportion of the corporate franchise tax collected from the corporation as corresponding to the amount of the stock so held.

PETITION, filed April 24, 1903, by the city of Worcester for a writ of certiorari addressed to the board of appeal in tax matters, to quash proceedings under R. L. c. 14, § 65, to determine the proportion alleged to be due to the petitioner under R. L. c. 14, § 61, from the corporate franchise tax collected from the Crompton and Knowles Loom Works, a manufacturing corporation established under the laws of this Commonwealth, upon twelve thousand four hundred and seventy shares of the capital stock of that corporation standing in the name of C. H. Hutchins, a resident of Worcester, as trustee for the corporation.

The case came on to be heard before *Braley*, J., who, at the request of the parties, reserved it for determination by the full court upon the question of law, whether the respondents, in view of the facts set forth in their record and the extension thereof in

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their return, "were required by law to decide that the distribution value of the twelve thousand four hundred and seventy shares of stock," named in the petition, or any part thereof, must be paid to the petitioner. If the question was answered in the affirmative, the writ of certiorari was to issue; if in the negative, the petition was to be dismissed.

A. P. Rugg, (*E. I. Morgan* with him,) for the petitioner.

F. H. Nash, Assistant Attorney General, for the respondents.

HAMMOND, J. A domestic manufacturing corporation, having its home office and sole place of business in the city of Worcester, had purchased certain shares of its own stock as an investment, and they were held by a resident of that city as trustee for the sole benefit of the corporation. The only question is whether under R. L. c. 14, § 61, there should be credited and paid to the city the tax upon these shares.

The petitioner contends that such a corporation, having its home office and sole place of business in the city, is a person who resides in that city within the meaning of those words as used respectively in R. L. c. 14, § 61, and c. 12, § 23, cl. 5, and that consequently the tax upon these shares should be credited to the city.

Without doubt the language of the statute is broad enough to cover a corporation, but in view of the history of the legislation upon the subject of the taxation of the personal property of corporations and the decisions of this court as to the interpretation of the statutes, we are of opinion that the position of the petitioner is unsound.

In the early tax acts no mention is made of corporate stock by name. Bank shares are first mentioned in 1793, (St. 1793, c. 9, A,) "shares or property held in any incorporate bridges or turnpike roads" in 1801, (St. 1800, c. 77, § 2,) and "shares in any other incorporated company possessing taxable property" in 1805, (St. 1804, c. 144, § 2.) Shares in insurance companies do not seem to have been mentioned specifically until the act of 1822, (St. 1821, c. 107, § 2.) In all cases the shares were to be assessed "according to the just value thereof" to the individual shareholders in the places where they respectively resided. There was no express provision for assessing the property of a corporation in any other way. An idea seems to have prevailed,

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however, to some extent at least, that within the meaning of the general provisions of the tax acts providing that real estate and personal property were to be assessed to the owner thereof, a corporation was an owner; and hence arose in some towns the practice of assessing a corporation for both its real and personal estate. When the shareholders were assessed the full value of their shares and the corporation was also assessed for its real and personal estate, there was a plain case of double taxation as to a portion at least of the corporate property both real and personal.

Finally it occurred to the Salem Iron Factory, a domestic corporation, to test the validity of the tax assessed upon it. For several years between 1796 and 1810, the assessors of Danvers had assessed a tax upon this corporation for its real estate, "consisting of the factory and the land under and adjoining the same," situated in that town; and also for the "personal estate, used in and about the factory." The corporation paid the taxes, and brought an action to recover back. It was argued for the plaintiff that the property of the corporation could not be lawfully taxed twice, and, since the stockholders were taxed for the full value of the shares, the whole tax assessed upon the corporation, as well that part upon the real as that part upon the personal estate, was invalid. The defendant, not denying that if the tax was valid there was double taxation, maintained that this was a matter to be corrected by the Legislature and not by the courts. The court said there was no doubt that the "property itself was a subject of taxation", and that it depended "on the construction of the several tax acts, whether the taxes should be assessed on the plaintiffs as the legal owners of the specific lands and goods, or on the several stockholders and members of the corporation, as the persons beneficially interested in the property"; and then stated that "the latter course seems best to comport with the general scope and object of the successive statutes for the valuation and taxation of estates within the Commonwealth." The shares being taxable to the individual shareholders in the towns where they respectively reside, the court proceeds to say that "it appears unjust, and contrary to the spirit of our laws, that the corporation should also be taxed for the same property", and hence the tax upon personal property was illegal.

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But a distinction was made between the tax on personal and that on real estate. Under the law real estate owned by a corporation was included in the valuation of a town upon which the State tax was based, but the corporation was not "included among the inhabitants of that town liable to taxation." The court, remarking that "it would therefore be unjust, if real estate, which is included in estimating the amount of taxes chargeable on the inhabitants of a town, by being transferred to another owner, should be exempted from contributing to the discharge of such taxes," held on that ground that the tax upon the real estate was valid. The court seemed to feel that this decision as to real estate might result in double taxation, but remarked that "if this result should appear to be injurious to the plaintiffs, a different decision would be not less so to the defendants; and the injustice, if any exists, can be remedied only by the Legislature." *Salem Iron Factory* v. *Danvers*, 10 Mass. 514.

We have reviewed this case at some length because it shows the ground upon which a distinction was made for purposes of taxation between the real and personal estate of a corporation, and because it also shows that this distinction was not expressly stated in the statute, but is the result of a judicial interpretation of its general provisions. It is to be noted in passing, that the distinction is based in no respect upon any supposed difficulty in ascertaining for purposes of taxation of personal estate the residence of a corporation. Although this decision was made in 1813, no change material to this question appears in the language of the statutes until St. 1832, c. 158. By this statute it was provided that "all the machinery employed in any branch of manufactory, and belonging to any corporation . . . or persons of this or any other State" should be assessed where such machinery was situated, and that in assessing the shares of a manufacturing corporation there should "first be deducted from the value thereof the value of the machinery and real estate belonging to such corporation otherwise specifically taxed." Here first appears in the statutes the idea of subtracting for purposes of assessment the value of the machinery and real estate of a corporation from the value of the shares held by the stockholders. These provisions were re-enacted in Rev. Sts. c. 7, § 10, cl. 2, and Gen. Sts. c. 11, § 12, cl. 2; and they continued to be the law until the change hereinafter named.

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In *Boston & Sandwich Glass Co.* v. *Boston*, 4 Met. 181, the principle enunciated in *Salem Iron Factory* v. *Danvers* as to the taxation of the personal property of a corporation was affirmed. And it was accordingly held that the provision of St. 1839, c. 139, that "all stocks in trade, including stock employed in the business of manufacturing, . . . in towns within the State, other than where the owners reside, shall be taxed in those towns, if the owners hire or occupy manufactories, stores, shops or wharves therein," did not apply to a manufacturing corporation. A still more striking illustration of the application of the same principle is shown in *Middlesex Railroad* v. *Charlestown*, 8 Allen, 330. In that case it was held that a corporation was not an owner within the meaning of Gen. Sts. c. 11, § 12, cl. 3, which provides that "horses employed in stages or other vehicles for the transportation of passengers for hire, shall be assessed to the owners in the places where they are kept." This court, speaking by Hoar, J., said: The "stockholders are liable to taxation upon their shares in the towns where they dwell. The value of the personal property owned by the corporation is included as a subject of taxation in the value of the shares."

In a word, the general provisions of law for the taxation of personal property were not applicable to corporations. Except as to machinery, which is specially mentioned, the personal property was reached through the shareholders. See in addition to the cases above named, *Dunnell Manuf. Co.* v. *Pawtucket*, 7 Gray, 277; *Worcester Ins. Co.* v. *Worcester*, 7 Cush. 600; *Worcester County Institution for Savings* v. *Worcester*, 10 Cush. 128, 129; *Murray* v. *Berkshire Ins. Co.* 104 Mass. 586, 589. And this interpretation, so far at least as respects domestic corporations, was adopted not upon the ground that it might be difficult to ascertain the residence of a corporation for purposes of taxation (although this consideration is sometimes alluded to), but plainly and simply upon the ground that the opposite interpretation would result in a form of double taxation.

Upon the facts appearing in this case the shares in question became by the purchase in substance the personal property of the corporation, and if the corporation had taken the certificate in its own name it is plain that under the former system of taxation the general provisions of the statute that personal property

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should be assessed to the owner would not have been applicable. The value of these shares would have been reached for taxation through the increased valuation of the shares still outstanding in the hands of the individual stockholders.

Inasmuch, however, as the certificate was not held by the corporation but by a trustee for its benefit, it may be urged by the petitioner that under the former system the stock would have been assessable to such trustee under Gen. Sts. c. 11, § 12, cl. 5 (now R. L. c. 12, § 23, cl. 5). But the same reasons which lead to the conclusion that the first and third clauses of that section are not applicable to corporations like this, lead also to a similar conclusion as to the fifth clause. As in the first and third clauses the word "owners" does not include corporations, so for the same reasons in the fifth the word "person" does not include them. Hence, even if it be assumed in favor of the petitioner that the shares in question had not been substantially withdrawn but were still outstanding, it seems plain that under the former system of taxation no tax could have been legally assessed on account of this stock, either upon the corporation under the first clause or upon the trustee under the fifth.

But for obvious reasons this method of reaching for taxation the property of corporations, especially that part represented by shares in the hands of non-residents, was defective; and by Sts. 1864, c. 208, and 1865, c. 283, a change was made so far as respects corporations like the one in question. An excise tax was imposed upon the corporate franchise, and the stockholders were relieved from taxation upon their shares, *Commonwealth* v. *Hamilton Manuf. Co.* 12 Allen, 298, *Manufacturers' Ins. Co.* v. *Loud*, 99 Mass. 146, and this system has ever since been continued. Pub. Sts. c. 13, §§ 38–40. R. L. c. 14, § 61. This excise tax is based upon a certain percentage of the actual cash value of the stock less the value of the real estate and machinery subject to local taxation, (R. L. c. 12, § 23, cl. 2,) and it is paid by the corporation to the State. In R. L. c. 14, § 61, is set forth the system for the distribution of this tax among the cities and towns. The clause upon which the petitioner relies is as follows: "If stock is held by . . . trustees, the proportion of tax corresponding to the amount of stock so held shall be credited and paid to the cities and towns where the stock would have been

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taxed under the provisions of clauses . . . five . . . of section twenty-three. . . ." Without reciting in detail the provisions of the method of distribution it is evident that its purpose was to give to towns a share of this excise tax corresponding to that which under the former system they had to the tax upon the personal property of these corporations, or in other words that the share of each town in the excise tax is measured by the number of shares which under the former system would have been taxable in that town. Such seems to be the natural meaning of the language used. Under that system, as we have seen, no part of the stock in question would have been taxable as such in Worcester, and therefore it cannot be considered in ascertaining the sum to be paid to that city on account of the excise tax. The word "person" in clause 5 can have no broader signification with respect to the distribution of the excise tax under the present law than it had with respect to assessment under the former. For cases somewhat instructive upon the question here involved, see in addition to those before cited, *Murray* v. *Berkshire Ins. Co.* 104 Mass. 586; *Boston Investment Co.* v. *Boston*, 158 Mass. 461.

Petition dismissed.

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ANNIE CONNORS *vs.* MERCHANTS MANUFACTURING COMPANY.

Bristol. October 26, 1903. — January 5, 1904.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Negligence, Employer's liability.

Where a freight elevator in a cotton mill, which goes only one floor below that on which a woman operative is working, opens a trap door automatically in going up or down, and the only warning of the starting of the elevator is the moving of the elevator ropes, it is negligence as matter of law for the operative after looking at the ropes, which are quiet and show that the elevator is below, to walk across the trap door for a purpose which could have been accomplished by taking another and longer route, and, if in doing this she is injured by the trap door opening and squeezing her against the wall, she cannot recover from her employer.

Evidence of the use as a passageway of a trap door, over an elevator well in the

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floor of a mill, opened automatically by the elevator going up or down, does not warrant a finding that the corporation maintaining the mill invited its operatives to use the trap door as a passageway, unless there also is evidence that the corporation had knowledge of such use or evidence from which such knowledge can be inferred.

An operative in a cotton mill crossing a trap door over a freight elevator two days after a statute has gone into effect requiring a warning device to be placed on such an elevator, but having no knowledge of the statute and no reason to suppose that the elevator is equipped with such a device, has no right to rely on the absence of such a warning of the opening of the trap door by the going up of the elevator, and if he so relies is negligent.

TORT for personal injuries received by the plaintiff on January 3, 1902, while employed in the weaving room of the defendant's cotton mill at Fall River. Writ dated January 20, 1902.

At the trial in the Superior Court *Lawton*, J. ruled that the evidence was not sufficient to warrant a verdict for the plaintiff, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

J. W. Cummings, (*E. Higginson* with him,) for the plaintiff.

A. J. Jennings, (*I. Brayton* with him,) for the defendant.

LORING, J. 1. We are of opinion that the judge was right in ordering a verdict for the defendant.

The plaintiff was employed in the weaving room of the defendant's cotton mill. She was injured while walking over a pair of wooden trap doors level with the floor, which covered the opening of a freight elevator well. These doors opened upward automatically when the elevator went up or down. The plaintiff was injured by the elevator's starting up and throwing up and back the trap door on which she stepped. She was taken off her feet, flung on one side, and squeezed against the wall.

The plaintiff went to work in mills when fourteen years of age, and continued working there until she was twenty years old, when she was married. She began again when she was thirty-one years old, about a year before the accident, and she had been employed in the room in question for six weeks. One of the looms tended by her was not eight feet from the trap doors.

The jury were warranted in finding that she was passing over the elevator well, on her way to get filling for use in her looms, and that she chose this way because the alley way was tempo-

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rarily blocked which led directly to the filling box in the southeast corner, some sixty feet away; that she had to get the filling to pursue her work, and that she chose this way of going because it would have taken ten minutes longer to go through the alley ways which were then open to her.

The plaintiff testified that she knew it was safer to go around the elevator than to go over it, for the reason that the doors might open up when the elevator was going up or down. She also testified that she looked twice at the elevator ropes before stepping on the trap doors; that the ropes were quiet, and so she stepped on the doors; and that they immediately flew up, causing the injury already described.

One of the plaintiff's witnesses testified that there was "no bell or anything to indicate when the elevator was going up or down, this condition being the same at the time of the accident, as it had been while the witness worked there, a period of three months."

We are of opinion that where an elevator, which goes no farther down than the floor below, opens a trap door automatically by going up and there is no warning of the starting of the elevator but the elevator ropes beginning to move, it is negligence as matter of law for a plaintiff who could have gone by another route to undertake to walk across the trap door when the ropes show that the elevator is below, and are quiet.

The plaintiff testified that she did not know that the trap doors would fly up without warning. But she proved by one of her own witnesses that there was no device to warn persons of the starting of the elevator, and the danger was so apparent to a person who knew the conditions as the plaintiff on her own testimony knew them, that it was negligent to undertake to cross without ascertaining that there was a device which would give sufficient warning to admit of a person crossing in safety.

The use of the trap door testified to by the plaintiff's witnesses did not warrant a finding that there had been an invitation by the defendant to use it as a passage way within *Hanlon* v. *Thompson*, 167 Mass. 190. There was no testimony that the defendant knew of the use of it as a passageway, and no evidence from which knowledge on the part of the defendant could be inferred. The testimony of the second hand in that room

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"that he told persons whom he saw passing the elevator trap that they ought to be more careful about going across that door, but did not tell them why," and "that of all the men and boys whom he had seen passing over the elevator he spoke to some, and to a good many he never spoke at all," is not evidence warranting such a finding.

2. The other exception is to the exclusion of evidence. The plaintiff was asked on direct examination: "'Whether or not when you went upon the elevator you expected and relied upon some sort of warning or signal being given if the elevator was about to start?' The question was accompanied by offer of proof that the plaintiff had such expectation and reliance." The plaintiff's argument in support of the competency of this question is based upon the fact that St. 1901, c. 439, went into effect upon January 1, two days before the accident, and that the statute required freight elevators to be equipped with a warning device. In the absence of evidence that the plaintiff had some reason to suppose that some device had been put upon the elevator, we think that the evidence could be properly excluded. There was no evidence that the plaintiff knew of the statute, and she had already testified that the only thing she saw or heard in the way of a warning that the elevator was coming up was the ropes moving. The fact that one cannot plead ignorance of the law in justification of a violation of it does not mean that he in fact knows the law and what the provisions of it are. As we have said, it was negligence to make the attempt without finding out that there was a device which would give sufficient warning. In other words, it was, as matter of law, negligent to rely on a warning without some reason to suppose that there was a device to give warning.

Exceptions overruled.

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GEORGE W. SPAULDING *vs.* QUINCY AND BOSTON STREET RAILWAY COMPANY.

Suffolk. November 9, 10, 1903. — January 5, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Negligence, On street railway.

In an action against a street railway company for an injury incurred when alighting from a car of the defendant, it appeared, that the accident occurred at six o'clock on an afternoon in October, but that it was not very dark, that the car having reached the destination of the plaintiff, some passengers got off and others got on, and the trolley was reversed, that the plaintiff, becoming aware that the car was about to go back, started out through the door to the front platform, where the motorman then was, and stepped off the car, that as he stepped upon the ground the car started suddenly and he fell, his foot being crushed by the wheel of the car. *Held*, that, even if the plaintiff could have been found to be in the exercise of due care, there was no evidence of negligence on the part of the defendant, there being nothing to show that the conductor or the motorman had any reason to suppose that the plaintiff was leaving the car when it was started.

TORT for personal injuries alleged to have been caused by the negligence of the servants of the defendant in starting an electric car of the defendant while the plaintiff was alighting from it. Writ dated May 19, 1899.

At the trial in the Superior Court *Sherman*, J. ordered a verdict for the defendant; and the plaintiff alleged exceptions.

J. E. Cotter, (*T. F. McAnarney* with him,) for the plaintiff.

H. F. Hurlburt, (*D. E. Hall* with him,) for the defendant.

KNOWLTON, C. J. On October 16, 1897, the plaintiff was travelling from Taunton to Boston by the street cars, on his way to Manchester, New Hampshire, for which place he intended to take a train that would leave Boston at half past seven o'clock in the evening. Soon after he had passed Holbrook he inquired of the conductor whether the electric car would reach Boston in time to enable him to take that train, and was told that probably it would not, and that to reach the train it would be well for him to leave the electric car and take a steam car, either at Braintree or Quincy. As the defendant's electric railway passes the station of the steam railroad in Braintree, there is a branch

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track leading from the main line, a distance of about two hundred and ten yards, to the station, and the car on which the plaintiff was riding left the main line and ran down this track to where the track terminated, and then ran back on the same track to the main line, and thence on to Quincy. After the car reached the terminus of the branch track at the station, some of the passengers alighted, the conductor carried the trolley around to the other end of the car, shutting off the lights in the car for a moment, and then put them on, other passengers got on the car, the car remained a sufficient time to enable any passengers who wished to alight or to get upon the car to do so easily, and the car then started back towards the main line. The plaintiff was sitting near the rear end of the car as it approached the station, and the forward end as it was about to go back. After seeing some of the passengers alight, and the conductor carry the trolley around from the rear of the car to the front, and after becoming aware that the car was about to go back, he started out through the door to the front platform where the motorman then was, and stepped off the car. It was nearly six o'clock, but not very dark, although there were lights in the car and near it outside. He testified that the car started suddenly just as he stepped upon the ground, and he fell, and his foot was crushed by the wheel of the car.

It is a grave question whether there was any evidence that he was in the exercise of due care. He had said nothing to the conductor or the motorman from the time when he made the inquiry in Holbrook. According to his testimony, he paid little attention to anything that was going on around him, he did nothing to obtain information in regard to the place where he was, or what were his surroundings, he gave no notice to any one of his desire or intention to alight, he was unable to give a clear account of how he stepped off, and he did not know whether there was a step on the car between the platform and the ground. It is not necessary to consider particularly the subject of the plaintiff's care, for we are of opinion that there was no evidence of negligence on the part of the defendant's servants. Although the plaintiff testified that the car started suddenly, there is nothing to indicate that the manner of starting it was unusual or dangerous. It is hardly possible to start a heavy electric car

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so quickly as to cause a jerk at the instant of its first movement, and if it is possible, there is no evidence that it was done in this case. The plaintiff's fall seems to have been caused by his stepping to the ground while the car was moving, and not by its starting in any unusual way. Nor is there evidence that there was negligence in starting the car at that time. Neither the conductor nor the motorman had any reason to suppose that the plaintiff desired to get off. If the conductor saw him pass out of the door to the front platform where the motorman was, that did not show that he was intending then to leave the car, and the motorman, so far as appears, knew nothing of his movement. The time had come for the car to start back towards the main line on its way to Quincy, and it was proper for those in charge of it to start it. In the absence of evidence that they knew, or saw, or ought to have seen anything that should have prevented them from starting the car at that time, the jury would not have been warranted in finding that they were negligent.

Exceptions overruled.

A. J. TOWER COMPANY *vs.* SOUTHERN PACIFIC COMPANY.

Suffolk. November 10, 1903. — January 5, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Carrier. Bill of Lading. Usage. Words, "Inflammable goods."

Where in an action on a bill of lading for the loss of goods shipped by a vessel of the defendant, the defendant relies on the defence that the goods were inflammable and therefore within an exception which permitted such goods to be stowed on deck at the owner's risk, the burden of proof is on the defendant to establish this defence.

In an action on a bill of lading for the loss of oiled clothing shipped by a steamship of the defendant, it appeared that the goods were lost by reason of being stowed on deck and that a clause of the bill of lading provided that all inflammable goods might be transported on deck at the owner's risk. There was uncontradicted evidence of a general usage of steamship companies to stow oiled clothing on deck and to class it as inflammable goods, and also that the plaintiff was the largest manufacturer of oiled clothing in New England and had for many years shipped goods to be carried by the steamship companies maintaining this usage. The trial judge ordered a verdict for the defendant. *Held*, that the case should have been submitted to the jury, as it was a question of fact and not of law whether the usage was proved and formed a part of the contract.

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CONTRACT for alleged breach of an agreement in a bill of lading to transport twenty cases of oiled clothing from New York to Galveston, Texas, by a steamship of the defendant. Writ dated December 7, 1900.

At the trial in the Superior Court before *Maynard*, J., it appeared, that the goods were shipped in a steamship of the defendant and were lost in a storm by reason of being carried on deck, having been thrown overboard when they became loose, and there was danger of their tearing the tarpaulin, which would have let water into the hold to the damage of the other cargo, and there also was danger of their interfering with the steering gear on the deck of the vessel. The only portion of the cargo lost was that stowed on the deck. The bill of lading contained the following provision: "Varnish, turpentine, camphene, burning fluids, acids, inflammable goods, or other dangerous articles shall be distinctly so marked as to indicate their character before shipment, and be transported if the carrier chooses, on deck or elsewhere, and they shall in all cases be at the shipper's or owner's risk."

The defendant contended that according to the usage and practice under which the goods were shipped, oiled clothing was classed as inflammable, and for that reason always was stowed on deck, and not in the hold; and that the oiled clothing in question was "inflammable goods" within the meaning of the clause in the bill of lading above quoted.

The character of the evidence sufficiently appears in the opinion. At the close of the evidence the defendant requested the judge to rule that upon all the evidence the plaintiff could not recover. The motion for this ruling was contested by the plaintiff on the ground that no custom was sufficiently proved as to oiled clothing in general, and no custom at all proved as to the oiled clothing manufactured by the plaintiff, that the effect of such proof as had been offered was for the jury, that, under the custom to mark bills of lading covering goods stored on deck so as to indicate that they were to be so stored, this particular bill of lading, which was not so marked, constituted a contract to carry the goods below deck, and that inasmuch as the loss would not have occurred if the goods had been carried below the deck, the defendant was liable for the loss occasioned by carry-

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ing the goods on deck, and that the whole case as to the evidence of custom, and as to all the facts, was for the jury and should be submitted to them.

The judge gave the ruling requested by the defendant, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

R. F. Herrick, for the plaintiff.

W. D. Turner, (*G. Hogg* with him,) for the defendant.

BRALEY, J. The goods named in the declaration having been delivered to and accepted by the defendant for transportation, it could not as a common carrier be relieved from the liability incurred by its undertaking to safely carry and deliver them unless the oiled clothing that constituted the consignment is within the exceptions provided for in the contract of affreightment.

It is conceded that no loss would have occurred from any danger of the seas, if the cases of oiled clothing had been stowed below deck; and the defendant now seeks to be relieved from the payment of damages caused to the plaintiff by their loss, on the ground that, being within the excepted articles classed as "inflammable goods," it had the right to transport them as it might choose on deck or elsewhere; even if by reason of their being stowed on deck they became loose while in transit during a severe storm, and were thrown overboard, not only to save other goods from damage, but to prevent their interfering with the necessary and proper navigation of the ship.

The burden of making out this defence is on the defendant. For this purpose it might show by competent evidence the composition and classification of the goods that were shipped and in so doing it would prove not only that they were within the class of merchandise that in the contract were at the shipper's or owner's risk, but that carrying them on deck would not be negligence on the part of the carrier.

After the captain of the ship had stated in his deposition to the admission of which in evidence no objection was made by the plaintiff, that the cases of oiled clothing were stowed on deck because of their inflammable nature, a foundation had been laid for the introduction of evidence to show a general usage; that because of its character it was customary among steamship companies to stow oiled clothing upon deck, "and that it was to be

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classed as inflammable goods." *Daniels* v. *Hudson River Ins. Co.* 12 Cush. 416.

The existence of such a custom or usage and the extent to which it prevailed could be shown by witnesses who from long experience and observation knew what they and others did with such goods that were to be stowed on board, and then carried by vessels from port to port. All the deponents described what they did, and had seen done in like conditions. They testified to a fact. *Haskins* v. *Warren*, 115 Mass. 514, 535. *Hutchins* v. *Webster*, 165 Mass. 439, 441.

Whether the personal knowledge and experience of the several deponents was sufficient to qualify them to give such evidence was to be passed upon and determined by the judge presiding at the trial, and no good reason appears why his discretion was not exercised properly. An experience in loading and stowing cargoes of vessels extending in the case of one witness over a period of forty years and in that of another for at least twelve years was sufficient.

The form of some of the questions, to which objection was made, as to what were the reasons for such a usage did not call for the opinion of the witnesses as to whether or not it existed, but for a statement by them why oiled clothing was stowed in this way; and because of its uniformity and long continuance such a method of stowage was evidence that it had ripened into a custom.

Their testimony with that of other witnesses showed a general, uniform course of dealing as applied to the particular contract in issue, so far as it related to the shipping and transportation of goods properly classified as oiled clothing.

Where a custom is general as applied to a particular transaction the presumption is that both parties to the contract knew of it; and that it became incorporated in their contract and is binding on them.

And in an action on a contract in which one party introduces evidence of such general custom, and claims that it enters into and forms a part of the agreement, he is not obliged to prove actual knowledge of it by the other party.

There was ample evidence in this case not contradicted by the plaintiff, not only of such a usage and custom, but that the

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plaintiff "was the largest manufacturer of such goods in New England, and had for many years shipped goods to be carried by these steamship companies."

For these reasons it became unnecessary for the defendant in order to bind the plaintiff to prove that it had actual knowledge of the custom relied on. *Stevens* v. *Reeves*, 9 Pick. 197, 201. *Packard* v. *Earle*, 113 Mass. 280, 283.

But such a presumption is one of fact for the jury, and not of law for the court. *Winsor* v. *Dillaway*, 4 Met. 221, 223. *Mooney* v. *Howard Ins. Co.* 138 Mass. 375.

The case should have been submitted to the jury to pass upon and determine this question, with instructions that the defendant must prove the alleged usage; and that if upon all the evidence they were satisfied that such a usage or custom existed, then from its long continuance and the extent to which it had prevailed, they would be warranted in finding that it was known to the plaintiff, and formed a part of the agreement, and the defendant having brought itself within the exceptions of the bill of lading, the plaintiff could not recover.

Exceptions sustained.

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SARAH E. STEVENS, administratrix, *vs.* BOSTON ELEVATED RAILWAY COMPANY.

SAME *vs.* SAME.

Suffolk. November 16, 1903. — January 5, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Negligence, On street railway. *Evidence.*

In an action against a street railway company by the driver of a carriage, for injuries from being run into by a car of the defendant on which the motorman did not sound the gong, a rule of the defendant, in a book of rules issued to motormen and conductors, in regard to sounding the gong when passing vehicles and in other cases, is admissible to show negligence on the part of the motorman.

TWO ACTIONS OF TORT by the administratrix of the estate of Charles N. Stevens, the first for the suffering of the intestate

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and the second for his death, both alleged to have been caused by the negligence of the defendant's servants in operating a car of the defendant. Writs dated respectively November 19, 1900, and September 20, 1901.

In the Superior Court the cases were tried together before *Fessenden*, J., without a jury. The plaintiff's intestate was a hackman driving a carriage in a funeral. According to the plaintiff's evidence the car came up from behind, and struck one of the forward wheels of the carriage and one of the horses. It was admitted that neither before nor at the time of the accident did the motorman sound the gong. The judge found for the plaintiff in both cases, assessing damages in the first case at $2,500, and in the second case at $4,000. The defendant alleged exceptions.

The exception relied upon was as follows:

The plaintiff offered in evidence one of the rules in a certain book admitted by the defendant to be a book of rules issued by the defendant company to its motormen and conductors, and admitted to have been the book of rules that was in force on the day of the accident. The rule which the plaintiff offered was Rule 83, and was as follows:

"Gong Ringing. The gong must always be sounded before starting, when starting, and before reaching, and at all street crossings, when passing other cars or vehicles, and at all points where vehicles or foot passengers are crossing or are liable to cross the tracks. The gong must not be sounded wantonly or unnecessarily, and when passing places of worship during service hours, making as little noise as possible. Upon approaching streets or crossings the power must be shut off and the car kept under perfect control. This rule must be strictly observed during all hours of the day and night."

To the admission of this rule the defendant objected. The counsel for the plaintiff said: "I put it in as a rule of conduct for your motorman by which he is to be judged to some degree." The judge then said: "I suppose it is put upon the same ground that an ordinance is put upon as bearing upon the carelessness or negligence of the person by whom the rules are to be followed. I will admit the evidence and save Mr. Thompson his exception." The rule was then admitted in evidence.

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W. G. Thompson, for the defendant.

S. L. Whipple & W. R. Sears, for the plaintiff.

KNOWLTON, C. J. The only exception now relied on by the defendant is to the admission in evidence of the defendant's rule in regard to sounding the gong, in connection with testimony that the defendant's motorman disobeyed the rule and that this disobedience was one of the causes of the accident. The decisions in different jurisdictions are not entirely harmonious upon the question now raised, but we are of opinion that the weight of authority and of reason tends to support the ruling of the judge in the present case.

It has been settled by various adjudications in this Commonwealth that the adoption of additional precautions for safety by a defendant, after an accident, cannot be proved, as tending to show liability for the method used at the time of the accident. *Menard* v. *Boston & Maine Railroad*, 150 Mass. 386. *Shinners* v. *Proprietors of Locks & Canals*, 154 Mass. 168. *Downey* v. *Sawyer*, 157 Mass. 418. *Hewitt* v. *Taunton Street Railway*, 167 Mass. 483, 485, 486. *Dacey* v. *New York, New Haven, & Hartford Railroad*, 168 Mass. 479, 481. This is the general rule in other jurisdictions. *Morse* v. *Minneapolis & St. Louis Railway*, 30 Minn. 465. *Columbia & Puget Sound Railroad* v. *Hawthorne*, 144 U. S. 202, 207, 208, and cases there cited.

On the other hand, a violation of rules previously adopted by a defendant in reference to the safety of third persons has generally been admitted in evidence as tending to show negligence of the defendant's disobedient servant for which the defendant is liable. The admissibility of such evidence has often been assumed by this court without discussion. *Mayo* v. *Boston & Maine Railroad*, 104 Mass. 137, 140. *Connolly* v. *New York & New England Railroad*, 158 Mass. 8, 10, 11. *Floytrup* v. *Boston & Maine Railroad*, 163 Mass. 152. *Sweetland* v. *Lynn & Boston Railroad*, 177 Mass. 574, 578, 579. See also in other courts, *Chicago, Milwaukee & St. Paul Railway* v. *Lowell*, 151 U. S. 209, 217; *Warner* v. *Baltimore & Ohio Railroad*, 168 U. S. 339, 346. In *Floytrup* v. *Boston & Maine Railroad*, *ubi supra*, Mr. Justice Barker said in the opinion, "The evidence of the usage of the road, that one train should not enter a station while another train was engaged in delivering passengers there,

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was competent upon the question whether the defendant's servants managed the train in a proper manner." Similar statements of the law may be found in numerous cases. *Dublin, Wickford & Wexford Railway* v. *Slattery*, 3 App. Cas. 1155, 1163. *Delaware, Lackawanna & Western Railroad* v. *Ashley*, 67 Fed. Rep. 209, 212. *Cincinnati Street Railway* v. *Altemeier*, 60 Ohio St. 10. *Lake Shore & Michigan Southern Railway* v. *Ward*, 135 Ill. 511, 518. *Georgia Railroad* v. *Williams*, 74 Ga. 723, 733. *Atlanta Consolidated Street Railway* v. *Bates*, 103 Ga. 333. The only decision to the contrary of which we are aware is in the case of *Fonda* v. *St. Paul City Railway*, 71 Minn. 438, 449.

It is contended by the defendant that there is no sound principle under which such evidence can be admitted. The evidence is somewhat analogous to proof of the violation of an ordinance or statute by the defendant or his servant, which is always received as evidence, although not conclusive, of the defendant's negligence. *Wright* v. *Malden & Melrose Railroad*, 4 Allen, 283. *Lane* v. *Atlantic Works*, 111 Mass. 136. *Hall* v. *Ripley*, 119 Mass. 135. *Hanlon* v. *South Boston Horse Railroad*, 129 Mass. 310. Such an ordinance or statute, enacted by a body representing the interests of the public, imposes *prima facie* upon everybody a duty of obedience. Disobedience is, therefore, a breach of duty, unless some excuse for it can be shown which creates a different duty, that, as between man and man, overrides the duty imposed by the statute or ordinance. Such disobedience in a matter affecting the plaintiff is always competent upon the question whether the defendant was negligent. So a rule made by a corporation for the guidance of its servants in matters affecting the safety of others is made in the performance of a duty, by a party that is called upon to consider methods, and determine how its business shall be conducted. Such a rule, made known to its servants, creates a duty of obedience as between the master and the servant, and disobedience of it by the servant is negligence as between the two. If such disobedience injuriously affects a third person, it is not to be assumed in favor of the master that the negligence was immaterial to the injured person, and that his rights were not affected by it. Rather ought it to be held an implication that there was a breach of duty towards him, as well as towards the master who prescribed the

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conduct that he thought necessary or desirable for protection in such cases. Against the proprietor of a business, the methods which he adopts for the protection of others are some evidence of what he thinks necessary or proper to insure their safety.

A distinction may well be made between precautions taken voluntarily before an accident, and precautions which are suggested and adopted after an accident. This distinction is pointed out in *Columbia & Puget Sound Railroad* v. *Hawthorne*, 144 U. S. 202, 207. Mr. Justice Gray, referring to changes made by a defendant after an accident, says in the opinion, "It is now settled, upon much consideration, by the decisions of the highest courts of most of the States in which the question has arisen, that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant." In *Morse* v. *Minneapolis & St. Louis Railway*, 30 Minn. 465, it is said, referring to the same subject, that "A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards." See also *Illinois Central Railroad* v. *Swisher*, 61 Ill. App. 611. In *Menard* v. *Boston & Maine Railroad*, 150 Mass. 386, and in some of the earlier cases there is language which goes further than the decision, and which might imply that such evidence as was received in this case is incompetent, but the case is authority only for that which was decided.

Exceptions overruled.

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FRANK HEATH *vs.* NEW BEDFORD SAFE DEPOSIT AND TRUST COMPANY.

184 481
188 535

Suffolk. November 17, 1903. — January 5, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Contract. Bank.

A trust company receiving a sum of money as a deposit for a person in another city with a request to notify that person by telegraph that the sum has been placed to his credit, if it credits the deposit and sends the telegram as requested, establishes the relation of banker and depositor, and can discharge its obligation only by paying the amount to or upon the order of the person to whom it is credited or his authorized agent.

CONTRACT for refusal to honor the plaintiff's check for the sum of $190 alleged to have been deposited in the defendant trust company, with a count for money had and received. Writ dated May 21, 1901.

At the trial in the Superior Court before *Pierce*, J., it appeared, that in 1901 the plaintiff was a stockbroker, doing business in Boston and elsewhere under the name of Heath and Company. On May 10, 1901, one Macomber was indebted to the plaintiff in the sum of $190 as a result of certain stock transactions conducted on behalf of the plaintiff by Macomber with certain persons in New Bedford and its vicinity. The plaintiff requested Macomber to deposit this money to the plaintiff's credit, under the name of Heath and Company, in the defendant trust company, and to have the defendant telegraph to the plaintiff at Boston when the deposit was made. Macomber, accordingly, made the deposit with the defendant, and the defendant at once telegraphed to the plaintiff that this amount had been deposited to the plaintiff's credit by Macomber.

At the time of making the deposit Macomber received from the defendant a card known as a signature card, for the purpose of obtaining thereon the signature to be honored by the defendant in checks and drafts against the deposit. Macomber took the signature card furnished by the defendant, and sent it to Heath and Company, and it never was returned to the defendant. The following day the defendant received a letter by mail pur-

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porting to come from Heath and Company, with a letter head bearing in print the name of Heath and Company and the business address of the plaintiff, asking the defendant to remit to them by check on Boston or New York the $190, and apparently enclosing a check for that amount. The defendant also received another letter purporting to come from Heath and Company, with a similar letter head, stating that the signatures thereon would be the signatures which the defendant should honor on checks of Heath and Company. The testimony was conflicting as to whether both of these letters were received in the same envelope.

The defendant thereupon sent for Macomber, and told him to draw out the money. A check was accordingly made out by Macomber for the amount of the deposit, and was signed "Heath & Company by C. W. Macomber," and this check was paid to Macomber by the defendant.

After the payment of the deposit to Macomber, the defendant wrote the following letter to the plaintiff: "Messrs. Heath & Company. Gentlemen: We herewith return you your check on us for $190. Mr. Macomber deposited this amount to your credit, but as we see you propose drawing at once upon it, we told Mr. Macomber to close the account, draw out his money, and we should return this check to you, we not being able to run an account in the way you desire. Yours truly, E. W. Bourne, Cashier."

The plaintiff thereafter drew a check on the defendant for the amount of the deposit which was presented for payment, but the defendant refused to honor it and returned it protested.

The defendant introduced evidence that on May 11 or 12, one Rice, who had acted as an agent of the plaintiff in establishing branch offices in the brokerage business, met Macomber at Taunton, that Macomber paid the amount of the deposit to Rice, and that Rice received it as agent for the plaintiff, knowing that it had been paid previously by the defendant to Macomber. The plaintiff denied that Rice was authorized at any time to collect money for him. The plaintiff also denied that Rice had ever accounted to him for the deposit. The plaintiff contended that no such payment to Rice as testified to by Macomber ever was made.

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The jury returned a verdict for the plaintiff for the amount of the deposit; and the defendant alleged exceptions.

M. R. Hitch & F. L. Norton, for the defendant.

J. Cavanagh, for the plaintiff.

BRALEY, J. The contention of the defendant that the money was received from Macomber, on the condition that he was to obtain the plaintiff's signature on the card furnished him, and return it to the company, and because he failed to comply with this request the money was not accepted, and it was returned to him, becomes untenable. At the time the money was handed to the cashier of the defendant he was informed that the deposit was to be made for the benefit of the plaintiff, and he was requested to send a telegram to him that it had been made and placed to his credit. A telegram was sent accordingly informing the plaintiff that $190 had been placed to his credit by Macomber.

The defendant was not obliged to take the money or send the telegram, but if it chose to do both it must stand by the contract thereby made.

Under the completed transaction the relation between the parties was that of banker and depositor, and the defendant became the debtor to the plaintiff for the amount of the general deposit placed to his credit. Its liability could be discharged only by payment of the debt. Ordinarily this could have been done in either of two ways: the plaintiff might have gone in person and demanded and received over the counter the money, or he could draw his check on the defendant for a part or the whole of the sum, and if the company paid to him, or to a person lawfully presenting a check signed by him, its indebtedness would be discharged. *Carr* v. *National Security Bank*, 107 Mass. 45.

But while Macomber in making the deposit obeyed the instructions given him by the plaintiff, the fact that he was his agent for that purpose would not of itself be sufficient to clothe him with authority to draw it out. The rule is clear that the acts of an agent not within the scope of his authority do not bind his principal.

The defendant apparently became dissatisfied by reason of the delay in not receiving the card containing the signature of the plaintiff, as well as by the fact that the deposit was to be imme-

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diately withdrawn. But its dissatisfaction could not operate to change the nature of the contract, or discharge it from liability.

When it paid over the money to Macomber it did so at its peril, and took the chance, that he was authorized to sign the check by which it was withdrawn in the name and behalf of the plaintiff.

In justification of its action and under an allegation of payment in the answer, it now relies on a subsequent ratification by the plaintiff of this act of Macomber arising out of a settlement of the accounts between them, and in which the amount of the deposit was included and credited to the plaintiff.

But it was a question of fact whether Rice, who purported to be an agent of the plaintiff for that purpose, was authorized by him to make such a settlement, and if so, whether it included the amount of the deposit.

The case was submitted to the jury under instructions which fully stated the legal rights of the parties. By their verdict they have found that the defendant has shown no sufficient legal reason to justify it in refusing to pay the demand of the plaintiff.

Exceptions overruled.

184 484
194 180

COMMONWEALTH *vs.* LISTER FIELDING.

Middlesex. November 17, 1903. — January 5, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Evidence, Photographs, Other crimes. *Burning Insured Property.*

On the trial of an indictment under R. L. c. 208, § 10, for burning an insured building with intent to injure the insurer, photographs representing the building that was burned, after having been verified properly, may be admitted in evidence, although they also show another building belonging to the defendant that had been partially destroyed by fire at a time previous to the burning charged, there being no evidence relating to the circumstances of the previous fire and the presiding judge having instructed the jury "that no inferences were to be drawn from the burning of any other building than that charged in the indictment."

INDICTMENT, returned on September 15 1903, under R. L. c. 208, § 10, as stated in the opinion.

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In the Superior Court the defendant was tried before *Aiken*, J. The jury returned a verdict of guilty; and the defendant alleged exceptions.

H. N. Allin, for the defendant.

H. Bancroft, Assistant District Attorney, for the Commonwealth.

BRALEY, J. This was an indictment under R. L. c. 208, § 10, charging the defendant with burning a building, which at the time was insured against loss or damage by fire, with intent to injure and defraud the insurer.

At the trial photographs representing the building that was burned, after having been properly verified, were put in evidence by the Commonwealth. Two of them also included a dwelling house owned and occupied by the defendant, that had been partially destroyed by fire some time previous to the burning of the building, which was the subject of the indictment. They also showed two dwelling houses adjoining the premises, from which witnesses at the trial testified that they had observed certain acts of the defendant at or about the time of the fire.

The location of these houses in reference to the burnt building became important, as showing the opportunity for observation of the witnesses who had described the movements and conduct of the defendant, and the photographs would materially aid the jury in understanding the case.

If evidence had been introduced tending to prove the commission of another like crime by the defendant, there would be ground for the position now taken by him that the introduction of the photographs tended to prejudice his case at the trial. But there was no testimony disclosing the circumstances under which the dwelling house was burned, or whether the fire which partially destroyed it was of malicious or accidental origin.

The appearance of the house partially burned, in the photographs, was as harmless as that of trees, flowers, fences, streets or other natural or artificial objects which may, and often do enter into, and form a part of the surroundings of the main object represented in the picture. "A plan or picture . . . is admissible in evidence, if verified by proof that it is a true representation of the subject, to assist the jury in understanding the case. . . . Whether it is sufficiently verified is a preliminary

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question of fact, to be decided by the judge presiding at the trial, and not open to exception." *Blair* v. *Pelham*, 118 Mass. 420. *De Forge* v. *New York, New Haven, & Hartford Railroad*, 178 Mass. 59, 62, 63.

As the photographs were sufficiently verified they were admitted properly as evidence in the case. Besides, the presiding judge instructed the jury "that no inferences were to be drawn from the burning of any other building than that charged in the indictment."

Exceptions overruled.

184 486
188 404
184 486
189 348
189 349

FRANK L. ALLEN & others *vs.* JOHN MAYERS & another, & trustee.

Bristol. November 18, 1903. — January 5, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Assignment. Contract.

An assignment of an unpaid balance due under a contract with a landowner for building a stable is not an assignment of future earnings, required by R. L. c. 189, § 34, to be recorded, to be valid against a trustee process, if the contract has been substantially performed and the landowner has accepted the stable, it having been completed with the exception of inserting a faucet for washing carriages, for which the owner has not designated the place, and some window fastenings of trifling value.

BRALEY, J. This is an action of contract brought by trustee process on October 25, 1898. Edwin L. Fisher summoned as trustee disclosed by his answer that he had made a contract with the defendants to build a stable for him to cost $1,473, of which sum an unpaid balance remained due from him at the date of the writ of $654. This balance was claimed by William H. Simmons under an assignment made and delivered to him September 9, 1898, but not recorded. The Superior Court having found for the plaintiffs, the case is here on report, and the question raised is whether the plaintiffs or the claimant are entitled to the money in the possession of the trustee.

If we assume that the agreement to build the stable was a contract for "future earnings" within the meaning of St. 1865,

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c. 43, § 2, re-enacted in R. L. c. 189, § 34, then an assignment of such earnings would be invalid as against attachment by trustee process if not recorded as therein required. *Somers* v. *Keliher*, 115 Mass. 165, 167.

In order to avoid this result the claimant now contends that the contract was either fully or substantially performed, and the stable accepted by the owner, and therefore the assignment operated on a sum then due and payable.

It is apparent from the report of the case that at the date of the assignment all the work had been done with the exception of putting in a "sill cock * . . . and the fastenings for six windows," and that the reasonable cost of this work, including materials, if done separately from the contract would not exceed for the sill cock the sum of $16, and for the fastenings twenty-five cents. The testimony of Mr. Samuel W. Ashton, admitted under the objection and exception of the plaintiffs, was inadmissible because it tended to contradict the answer of the trustee. *Phillips* v. *Meagher*, 166 Mass. 152. Otherwise the uncontradicted evidence to which there was no objection, tended to show that the defendants agreed to complete the contract by August 20, 1898, but as a matter of fact did not do so until August 29 of that year, and that the sill cock was not put in, because the specifications among other things provided "there will be one sill cock, at some point in the front sill, indicated by the owner," and up to the time when the defendants with these exceptions had completed the work, no place had been designated by the owner where it was to be put.

It further appeared that at this time Fisher had the keys to the stable and was using it, and it may fairly be inferred from his answers as trustee to the interrogatories propounded to him, and the evidence in the case, that he was not only in possession, but also treated the contract as having been substantially performed in good faith by the defendants. The sill cock had not been put in place because up to that time he had failed to indicate to them where he wanted it; and if it can be technically contended that the value of the window catches, and the necessary work to put them on would be enough to justify a refusal by him to pay the balance due under the contract, he would

* A faucet used when washing carriages.

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under the circumstances be obliged to rely upon his claim for damages, if he had suffered any by reason of the failure of the defendants to exactly and fully perform their contract, and he could not thereby successfully escape paying for what he had received.

It would be manifestly unfair to allow the owner to take advantage of the condition precedent and refuse to pay, when knowing of the failure to perform the contract, he nevertheless accepts, uses, and enjoys what has been done, and in all but trifling details has the very thing for which he bargained. We know of no principle of law requiring such a result. *Hayward* v. *Leonard*, 7 Pick. 181, 187. *Wiley* v. *Athol*, 150 Mass. 426, 435.

It follows that at the date of the assignment the defendants had earned, and were entitled to the balance due to them under the contract, less whatever sum might be necessary to supply and affix the sill cock and window catches to the stable.

In accordance with the terms of the report the order will be, "Trustee charged upon his answers, if within fifteen days the plaintiffs shall pay to the claimant the sum of $500 and interest thereon at one and one half per cent a month, from October 9, 1898, to the date of such payment, and his costs to be taxed by the clerk; otherwise trustee discharged."

So ordered.

F. A. Pease, for the claimant.

J. M. Swift, for the plaintiffs.

MARGARET RICE *vs.* JOHN RICE.

Essex. November 18, 1903. — January 5, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Superior Court. Husband and Wife. Practice, Civil.

An appeal to the Superior Court from a decree of the Probate Court, declaring that the petitioner is living apart from her husband for justifiable cause and ordering that he be prohibited from imposing any restraint upon her personal liberty until further order of the court, does not abate on the death of the wife, testate, there being under R. L. c. 153, § 36, a question of property in regard to the husband's right to waive the provisions of his wife's will which must be disposed of by the Superior Court on the appeal.

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KNOWLTON, C. J. Under the R. L. c. 153, § 33, the petitioner filed in the Probate Court a petition averring that she was living apart from the respondent, her husband, for justifiable cause, and that there was no issue of the marriage, and praying that he might be prohibited from imposing any restraint upon her personal liberty and from entering certain premises belonging to her, and that he should pay such sum as the court might order. On this petition the Probate Court made a decree stating that the petitioner was then living apart from the respondent for justifiable cause, and ordering that he be prohibited from imposing any restraint upon her personal liberty until the further order of the court. From this decree the respondent appealed to the Superior Court and the appeal was duly entered there. Afterwards the petitioner deceased, and the respondent moved that her executor or administrator be summoned as a party to the proceedings. The executor of her will then appeared specially and suggested the death of the petitioner, and moved that the appeal be dismissed. This motion was allowed, and the respondent appealed to this court.

A petition of this kind, in a case where there are no children of the marriage, is brought for relief which is personal to the petitioner and which cannot be granted with any effect after her death. Like an ordinary suit for a divorce, unless there are peculiar conditions, it is abated by the death of either party before the determination of the issue. *Rawson* v. *Rawson*, 156 Mass. 578. *Brigham, petitioner*, 176 Mass. 223, 226. *Stanhope* v. *Stanhope*, 11 P. D. 103, 108. It is clear that this suit would abate and the petition be dismissed were it not for the fact that a decree was entered for the petitioner by the Probate Court. That decree, with the appeal from it, raises questions which are not free from difficulty. By the R. L. c. 162, § 19, it is provided that such a decree or order "shall have effect, notwithstanding an appeal, until otherwise ordered by a justice of the Superior Court," etc. The R. L. c. 153, § 36, declares that, "If a court having jurisdiction has entered a decree that a married woman has been deserted by her husband or is living apart from him for justifiable cause, . . . the surviving husband shall not be entitled under the provisions of section sixteen of chapter one hundred and thirty-five to waive the provisions of a will made

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by her." This case shows that the petitioner made a will; for the executor is before us. If these statutes are given effect literally, the respondent is precluded by the decree from waiving the provisions of this will. On the face of the record, this decree, from which he took an appeal, seems to affect his rights of property, and we must determine what action he may take in regard to it. There are different possible views of the situation. One is that, the decree having been appealed from, and the petitioner having deceased before the case was heard in the appellate court, the suit should abate, the decree be set aside, and the petition dismissed. Another is that, the death having occurred while the decree was in force under the statute, the appeal should be dismissed, and the decree left with the same effect upon the respondent's rights as if there had been no appeal. Another is that the executor, representing the petitioner and the claimants under the will, should be permitted to prosecute the petition in the appellate court for the purpose of protecting the rights of property which the decree gave, and which were left undetermined after the appeal. Action in accordance with either of the first two views would not lead to a result founded on a final determination of the facts in issue between the parties, but upon an arbitrary adjudication as to the effect of existing incidental conditions.

It has been said in many cases that when rights of property have arisen, founded on proceedings for a divorce, and one of the parties has deceased before the conclusion of the proceedings, his representative may become a party to the suit for the purpose of enabling the court to determine the issue and make the decree which shall settle such rights. *Thomas* v. *Thomas*, 57 Md. 504. *Downer* v. *Howard*, 44 Wis. 82. *Danforth* v. *Danforth*, 111 Ill. 236. *Nickerson* v. *Nickerson*, 34 Ore. 1. *Israel* v. *Arthur*, 6 Col. 85. See also *Barney* v. *Barney*, 14 Iowa, 189; *Wilson* v. *Wilson*, 73 Mich. 620; Nelson on Divorce, § 729 *a*. We do not know the value of this right to waive the provisions of the petitioner's will. Plainly it is a right of property which has some value. If the effect of the appeal had been to vacate the decree, we should think the most natural and logical view would be to say that the death of the petitioner before the entry of any effectual decree leaves the parties as if no suit had been brought. But under

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the statutes cited, which leave the decree in force until it is otherwise ordered by the Superior Court, and which give the decree this effect upon the right of waiver, it seems almost necessary that further action should be taken to determine the rights of the parties. We are of opinion that the executor should be permitted to represent the petitioner, and that the case should stand for hearing under the appeal upon the question whether the petitioner was living apart from the respondent for justifiable cause.

The effect of appeals and the jurisdiction of the appellate court in cases of this kind were considered at length in *Smith* v. *Smith*, *ante*, 394. That decision makes it plain that it became the duty of the Superior Court, after the entry of the appeal, to proceed with the case so far as necessary to make an order which should finally dispose of all the questions involved in the appeal. The decree to be certified by the Superior Court to the Probate Court in this case should leave nothing for further action in the lower court. The order allowing the motion was erroneous.

Order revoked.

H. I. Bartlett, for the respondent.

E. S. Spalding & N. N. Jones, for the petitioner.

NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY & another *vs.* INHABITANTS OF BLACKSTONE.

Worcester. September 28, 1903. — January 6, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND, LORING, & BRALEY, JJ.

Railroad. Damages. Words, "Land damages."

On a petition of a railroad company under R. L. c. 111, § 135, for damages from the alteration of a crossing of a highway with the railroad of the petitioner, the award of a special commission appointed under R. L. c. 111, §§ 136, 137, is material and admissible in evidence, as the special commission, in apportioning the expenses between the railroad company and the town, could decide that the railroad company should contribute to the alteration its land and all damages suffered by it, in which case its only remedy, if aggrieved, would be by an

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application for a jury under § 138 of the same chapter, while in the absence of such a decision by the special commission, the railroad company would have the same right to compensation under § 135 that a stranger would have.

An award of special commissioners, under R. L. c. 111, § 136, relating to the widening of a street of a town between two abutments supporting an overhead bridge of a railroad company, directed the town to pay "the entire expense of land damage occasioned by the taking of land and property for the widening" of the street, and that all other charges and expense occasioned by carrying into effect such decision should be paid two thirds by the railroad company and one third by the town. *Held*, that under this award the town was to pay for an abutment of the bridge on land of the railroad company taken for the street as well as for the land itself, that the town also was to pay to the railroad company the extra expense of the new bridge and abutment made necessary by the widening of the street, after deducting the increased value of the new structure over the old to the railroad company for use in its business, and also was to pay to the railroad company the expense of removing to a new location a water crane and valve pit, upon land adjacent to that taken, used for furnishing water to locomotives and required to be moved by reason of the construction of the new abutment.

On a petition by a railroad company under R. L. c. 111, § 135, for damages from the alteration of a crossing of a highway with the railroad of the petitioner, if a special commission appointed under R. L. c. 111, §§ 136, 137, has made an award, providing, among other things, that the railroad company shall pay all future charges for keeping in repair the abutments and foundations of the railroad bridge over the highway, the petitioner is not entitled to compensation because it is required by a decree of the county commissioners to maintain a bridge to span a street thirty-three feet wide instead of a street nineteen feet wide, as it was before the alteration.

PETITION, filed February 23, 1900, by the New York, New Haven, and Hartford Railroad Company and the New England Railroad Company against the inhabitants of Blackstone, for damages under the provisions now re-enacted in R. L. c. 111, § 135.

In the Superior Court the case was heard by *De Courcy*, J., who directed the jury to return a verdict for the petitioners in the sum of $60.85, representing the value of the land of the petitioners, subject to its use for railroad purposes, taken by the town of Blackstone for the widening of St. Paul Street as required by a decree of the county commissioners. At the request of the petitioners the judge reported the case for determination by this court. If the ruling of the judge was right upon all the questions raised, the verdict was to stand; otherwise the verdict was to be set aside, and the case was to be sent to an assessor for the ascertainment of damages in accordance with such rules as this court might determine should be followed.

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The rulings of the judge appear by the opinion. The award of the special commissioners, under the provisions now re-enacted in R. L. c. 111, § 136, described and referred to by the court, was as follows:

"First. Said town of Blackstone shall carry into effect so much of the decision of said County Commissioners as requires the taking of land and other property for the purpose of widening said St. Paul street.

"Second. All other matters, removals, excavations, works and constructions required by said decision of the County Commissioners, shall be carried into effect by said New England Railroad Company.

"Third. Said New England Railroad Company shall pay all future charges for the keeping in repair the abutments and foundations thereof, and the bridge over said St. Paul street.

"Fourth. Said town of Blackstone shall keep in repair said St. Paul street between said abutments.

"Fifth. Said town of Blackstone shall pay the entire expense of land damage occasioned by the taking of land and property for the widening of said St. Paul street, as required by said decree of the County Commissioners.

"Sixth. The costs of said petition to the County Commissioners, including the costs upon appeal, shall be paid by said New England Railroad Company to said petitioners.

"Seventh. All other charges and expense occasioned by carrying into effect such decision, including cost of the hearing before said special commission, are hereby apportioned two-thirds to said New England Railroad Company, and one-third to said town of Blackstone.

"Eighth. No portion of the charges, expense and costs of carrying such decision into effect, and of any proceedings in relation thereto are apportioned to the county of Worcester."

This award was returned into court, and neither party appealed therefrom.

The offers by the petitioners of evidence excluded by the judge, which are referred to in the opinion, were as follows: The petitioners offered to show that at the time of the decree of the county commissioners and the taking under a decree of the road commissioners of Blackstone, there was upon the land

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taken, a bridge abutment constructed of granite, which had a value as a structure in connection with the land taken for use in railroad purposes of $2,750; that the extra expense of the new bridge and new abutment constructed in accordance with the decree of the county commissioners, after deducting the increased value that the new structure had over the old to the railroad for use in its railroad business, was $11,878. The petitioners also offered to show that by reason of the decree of the county commissioners they now were required to maintain a bridge to span a street thirty-three feet wide in place of the old street nineteen feet wide; and that in order to compensate them for this liability they should be paid the sum of $1,940. The petitioners further offered to show that upon land adjacent to but not within the area taken by the road commissioners of Blackstone, there were located a water crane and valve pit, for furnishing water to the petitioners' locomotives, which, by reason of the decree of the county commissioners and the construction of the new abutment thereunder, it became necessary for the petitioners to remove and place in a new location at an expense of $700.

The case was argued at the bar in September, 1903, before *Knowlton*, C. J., *Morton*, *Barker*, *Hammond* & *Loring*, JJ., and afterwards was submitted on briefs to all the justices.

A. P. Rugg, for the petitioners.*

F. N. Thayer & *M. N. Thayer*, for the respondent.

LORING, J. The selectmen of Blackstone brought a petition for the widening of St. Paul Street, between two abutments supporting an overhead bridge, on which the tracks of the New England Railroad were laid. The county commissioners decided in favor of the widening, and a special commission was appointed under what is now R. L. c. 111, § 136, to determine which party should carry the decision into effect and which party should pay the charges and expenses of the alteration, the future charge of maintenance and the costs of the several proceedings. Their award was in substance this: The town was to carry into effect so much of the decree as required the taking of land and other property to widen St. Paul Street; all construction was to be

* The real petitioner in interest was the New York, New Haven, and Hartford Railroad Company, and is referred to throughout the opinion in the singular number.

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carried into effect by the railroad, including the remaking of St. Paul Street as well as the rebuilding of the railroad bridge and its abutments; in the future the railroad bridge and its abutments were to be maintained by the railroad, and St. Paul Street by the town; the town was to pay the "entire expense" due for land and property taken in widening St. Paul Street; and all other charges and expense were to be borne two thirds by the railroad company and one third by the town.

In pursuance of the decree the town took ten hundred and fifty square feet of land within the location of the railroad owned by it in fee, and covered by the abutment of the railroad bridge on the northerly side of St. Paul Street and "all buildings, erections and structures standing on the above described and bounded tract of land." The railroad brought the petition now before us to recover compensation for this taking.

The petitioner's first exception is to the introduction in evidence of the award of the special commission. Its contention here is that it is entitled to compensation under what is now R. L. c. 111, § 135, and that the right so given is not affected by the award of a special commission under § 136, and that it was so decided in *New England Railroad* v. *Railroad Commissioners*, 171 Mass. 135. But we are of opinion that the special commission appointed under what is now R. L. c. 111, § 136, in apportioning the expenses between the railroad and the town, could have provided that the railroad should contribute to the alteration its land and all damages suffered by it. In the absence of such a provision in the award of the special commission, the railroad would have the same right to compensation which a stranger would have under what is now R. L. c. 111, § 135. But if the special commission does make a provision in its award that the railroad shall bear the burden of the compensation due for its property taken to carry out the alteration, and the railroad feels aggrieved, its remedy is to take an appeal to a jury under what is now R. L. c. 111, § 138. The award of the special commission was properly admitted.

The petitioner's right to compensation, therefore, depends upon this: First, would it be entitled to compensation apart from the award of the special commission? Second, does that award take it away?

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The real question in the case at bar is the true construction of the fifth article of the commissioners' award directing the town to "pay the entire expense of land damage occasioned by the taking of land and property for the widening of said St. Paul street," in connection with the seventh article directing that "All other charges and expense occasioned by carrying into effect such decision, including cost of the hearing before said special commission," shall be paid, two thirds by the railroad and one third by the town.

The ruling of the Superior Court was "that the value of the land, subject to its use for railroad purposes, was the only thing that the petitioner was entitled to recover under the award of the special commission." We are of opinion that this was wrong.

Had the award provided that the town should pay the "damage occasioned by the taking of land and property for the widening of St. Paul Street," it would hardly be contended that the railroad could not recover compensation for the taking of the abutment which covered the land taken as well as for the land taken. The insertion of the word "land" before damage does not lead to a different conclusion. Compensation for land taken under the power of eminent domain and for the buildings on it is technically "land damages." The building is technically not only a part of the land but is technically land; and an action for compensation for land taken under the power of eminent domain and buildings which are upon that land is, as matter of technical law and ordinary parlance, spoken of as an action for "land damages." To exclude the value of the abutment and to confine the railroad to the value of the land is to read out of the article the provision that the town shall pay the damage occasioned by the taking of property as well as of land. This conclusion is reinforced by reference to the first article of the award by which the special commission provided that the town should carry into effect so much of the decree of the county commissioners as requires the taking of land and other property, and by reference to the taking made in pursuance to this article, which was a taking of the ten hundred and fifty square feet and "all buildings, erections and structures standing on the above described and bounded tract of land."

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We are therefore of opinion that the petitioner was entitled at least to the value of the abutments then on the land as well as to the value of the land.

But the petitioner is not entitled to compensation because it was required by the decree of the county commissioners to maintain a bridge to span a street thirty-three feet wide in place of the old street nineteen feet wide. By the third article of the award of the special commission, this burden was cast upon the railroad, and the petitioner's exception to this evidence must be overruled.

This brings us to the petitioner's contention that as part of the damages to which it is entitled it has a right to compensation by reason of the fact that the parcel of its land which has been taken is land on which one abutment of its railroad bridge was constructed, and that the taking of the land to widen St. Paul Street over which its railroad bridge is constructed has forced it to rebuild the bridge and this abutment.

Apart from the burdens cast upon the parties by the award of the special commission, the petitioner would be entitled to these damages. *Boston & Albany Railroad* v. *Cambridge*, 159 Mass. 283.

The respondent's contention here is that the cost of the construction of the new abutments and of the new bridge is covered by the seventh article. But that is not so. That article does not provide that all charges and expenses occasioned by carrying the county commissioners' decree into effect shall be paid two thirds by the railroad and one third by the town; what it does provide is that "all other charges and expense" so occasioned shall be so paid. That is to say, all other charges and expenses not provided for in the fifth article which throws on the town the entire expense of the land damages occasioned by the taking of land and other property. In addition to the rebuilding of the railroad bridge and its abutment, there was the rebuilding of St. Paul Street. The seventh article, therefore, finds in the rebuilding of the street other charges of construction in addition to those covered by the fifth article, and finds in the maintenance of the bridge thrown on the railroad by the third article and that of the street thrown on the town by the fourth article, charges and expenses other than charges and expenses of construction.

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Effect, therefore, can be given to this article, even if it does not cover the cost of construction of the railroad bridge and its abutment.

The only ground on which it could be held that these damages cannot be recovered is that by the terms of the fifth article the damages to which the petitioner is entitled are "land damages," and not all damages "occasioned by the taking of land and property." But we are of opinion, for the reasons already given, that that is not enough to exclude these damages to which the petitioner otherwise would be entitled, and that evidence that "the extra expense of the new bridge and new abutment constructed in accordance with the decree of the county commissioners, after deducting the increased value that the new structure had over the old to the railroad for use in its railroad business, was $11,878," should have been admitted as bearing on the damages to which they are entitled by the taking of their land.

The special commission evidently took the following view of the matter: This widening is for the sole benefit of the travelling public, and in no respect or aspect for the benefit of the railroad. The burden of paying for the highways is under our system of laws thrown on the town in which they are located. It is therefore fair that the land damages legally due for widening this public way, whatever they may be, shall be paid by the town, and that the balance (since the burden of widening the way is thrown on the town alone) should be put more heavily on the railroad.

The damage suffered by being forced to remove the water crane and valve pit to a new location was also a subject for which the petitioner was entitled to compensation. The other matters claimed by the petitioner seem to be properly included in the offers of evidence which we have discussed.

In accordance with the terms of the report the entry must be

Verdict set aside; case to stand for hearing before an assessor.

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CHARLES FRAZER & another *vs.* WILLIAM A. FULLER & others.

Worcester. October 21, 1903. — January 6, 1904.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Great Pond.

In an action for an alleged trespass in maintaining an ice run, over land leased to the plaintiff covered with water and adjoining a great pond whose limits had been extended artificially, it was *held* that the conflicting evidence in the case warranted a finding that the line of the pond as it originally existed adjoined land to which the defendant's lessor had acquired title by prescription, and that a verdict for the defendant was justified.

TORT, against William A. Fuller, and William H. Martin and James A. Martin, the last two alleged to be co-partners doing business under the name of Martin Brothers, for alleged breaking and entering of the plaintiffs' close, and cutting and carrying away a quantity of ice. Writ dated January 24, 1901.

In the Superior Court the case was tried before *Bell*, J. The plaintiffs were ice dealers in the town of Clinton. The defendants Martin also were ice dealers in that town. The defendant Fuller was a lumber dealer, who, as contended by the plaintiffs, furnished the materials or money for the construction of the runway complained of. The plaintiffs claimed title under a deed from Nathaniel Rice to the Clinton Company, dated January 3, 1850. On November 20, 1863, the Clinton Company conveyed the plaintiffs' premises to the Bigelow Carpet Company and on January 1, 1901, the Bigelow Carpet Company leased them to the plaintiffs. The defendants Martin claimed title under a lease from Kate and Eliza Durkin, dated November 18, 1900, as to a portion of the premises, and alleged that the rest was part of a great pond. The Durkins' claim of title to the premises on which the alleged trespass was committed was by prescription. The plaintiffs' leased premises contained one acre and one thousand two hundred and two square feet of land, most of which, at the date of the defendants' lease, was covered by the waters of Mossy Pond.

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It appeared in evidence and was agreed, that in the autumn of 1847 the Clinton Company, acting under the mill acts, raised the dam at their mill, now the mill of the Bigelow Carpet Company, eight and forty-one one hundredths feet, and that Mossy Pond, before the raising of the dam in 1847, was a natural pond of more than twenty acres. It also appeared that in 1900 and January, 1901, the defendants constructed an ice house on the land covered by their lease and outside of the land contained in the plaintiffs' lease, and built a run for conveying their ice from the pond into the ice house, connecting with the ice house and extending down to and into the water. This run extended from eighty to ninety feet over the land covered with water described in the plaintiffs' lease, and was part of the trespass complained of.

The plaintiffs contended, first, that Fuller was a joint tort-feasor with the Martins in the trespass complained of; second, that the part of the land included in their lease and now covered by water was not part of a great pond; that though Mossy Pond, before the raising of the Clinton Company's dam in 1847, was a great pond containing more than twenty acres, yet the land in dispute, before the raising of the dam, and while it was owned by Nathaniel Rice, was dry or marshy land in 1847, and that raising the dam did not make the leased premises, so covered by water, a part of a great pond; that Nathaniel Rice's deed conveyed title to the land under the water, that the Clinton Company's title inured to the plaintiffs through the carpet company's lease, and that none of the rights of the public in great ponds attached to the disputed premises.

The defendants contended, that the Durkins had occupied a part of the land on which the alleged trespass was committed down to low water mark for more than twenty years under a claim of title; that the remaining portion of the plaintiffs' leased land on which the alleged trespass was committed, now covered by water, was a part of the original great pond in which the public have the rights which attach to great ponds in this Commonwealth. The plaintiffs denied both of these contentions.

The evidence was conflicting. The plaintiffs asked the judge to instruct the jury that on the evidence the verdict must be for the plaintiffs, with at least nominal damages against the defend-

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ants Martin, and also against the defendant Fuller. The judge refused to make these and other rulings requested by the plaintiffs.

The jury returned a verdict for the defendants; and the plaintiffs alleged exceptions.

H. Parker & J. Smith, for the plaintiffs.

C. G. Bancroft, A. G. Buttrick & O. L. Stone, for the defendants.

HAMMOND, J. The principal question is whether any part of the ice run was upon or over land of the plaintiffs. The plaintiffs had a lease which in terms described land over which the run was built, but the answer of the defendants was that in fact the plaintiffs had no title to the land because a part of it was included within a great pond, and as to the rest the defendants had a title by disseisin. In other words the defendants claimed title by disseisin as far as the edge of the pond, and denied that the plaintiffs had any title under the lease to the land forming part of the pond.

The evidence as to whether there was any title by disseisin to any part of the land described in the plaintiffs' lease and as to the original boundaries of the pond was conflicting. The rules of law applicable to these questions were explained to the jury, and at the close they were instructed in substance that if the line of the pond as it originally existed met the line to which the defendants' title by prescription extended, so that under the runway there was no intervening land between the two lines, then their verdict should be for the defendants. It is now strenuously argued by the plaintiffs that there was no evidence which would justify the jury in finding that the two lines did thus meet.

Without rehearsing the evidence in detail it is sufficient to say that after a careful perusal of it we are of opinion that it is sufficient to justify the verdict. The case was properly submitted to the jury under instructions which were full, apt and clear, and we see no error in the manner in which the judge dealt with the plaintiffs' requests for instructions upon this branch of the case.

The exceptions with reference to the relation of William A. Fuller were not argued before us, and they are therefore deemed to be waived.

Exceptions overruled.

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SELECTMEN OF DANVERS *vs.* COMMONWEALTH.

Essex. November 4, 1903. — January 6, 1904.

Present: KNOWLTON, C. J., MORTON, BARKER, LORING, & BRALEY, JJ.

Practice, Civil, Referee, Costs. *Waterworks. Danvers. Evidence. Interest.*

On an award of commissioners, appointed under a statute as referees, the only questions of law open are those referred by the commissioners to the court.

A full statement by referees in their award of the principles of law on which they proceeded is not enough to submit to the court the correctness of those principles or of their application to the case.

The town of Danvers and the commissioners of the lunatic hospital acting for the Commonwealth, on June 23, 1876, made a contract by which the Commonwealth agreed to construct a reservoir near the hospital at Danvers at its sole expense and keep it in condition, and the town was to have the perpetual right to use the reservoir "as a storage basin for a supply of water to said town and to such other places as the town may hereafter desire." Upon the introduction of water to the reservoir by the town as agreed, the Commonwealth was to pay to the town $12,500 and annually thereafter for the term of twenty years the sum of $1,000 as full compensation for the supply of water for the hospital. At the expiration of the twenty years the Commonwealth and the town were to fix by mutual agreement the annual water rates thereafter to be paid by the Commonwealth. St. 1898, c. 564, provided that if the town and the trustees of the hospital should fail to agree as to the amount of compensation to be paid by the Commonwealth for water supplied by the town to the hospital under the contract, three commissioners should be appointed to determine the sum to be paid for such water each year from December 1, 1896, to December 1, 1899. On an award made by commissioners so appointed, it was *held*, that there was no error of law in a decision of the commissioners that the town was not entitled to charge the Commonwealth a profit on water consumed at the hospital, and that the Commonwealth should pay its share of the expenses actually incurred by the town in maintaining the whole system of waterworks, including extensions of distributing pipes. *Held, also*, that there was no error in a decision of the commissioners that no reduction was to be made from the sum awarded by the commissioners by reason of the payment of the $12,500 by the Commonwealth on the completion of the reservoir.

At a hearing before commissioners appointed under St. 1898, c. 564, to determine the amount to be paid by the Commonwealth to the town of Danvers for the use of water furnished to the Danvers lunatic hospital during a period named, under the contract between the Commonwealth and that town, evidence of the sums paid for water at the State prison and in other towns was held to have been excluded rightly.

On an award by commissioners appointed under a statute, to determine the amount to be paid by the Commonwealth to a certain town for the use of water annually during a period named, under a contract between the Commonwealth and the town, the Commonwealth was held to be liable for interest from the end of each year covered by the award.

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Where commissioners were appointed under a statute, to determine the amount due to a town for water supplied to the Commonwealth, on a failure of the parties to agree on the amount due, and neither the petitioner nor the respondent was satisfied with the award, the petitioner was regarded as the prevailing party, and as such entitled to costs in the proceedings before the commissioners, the award being silent as to costs.

PETITION, filed October 26, 1898, under St. 1898, c. 564, by the selectmen of the town of Danvers for the appointment of commissioners to determine the amount due to that town from the Commonwealth for water furnished to the Danvers lunatic hospital, now called the Danvers Insane Hospital, from December 1, 1896, to December 1, 1899.

The case came on to be heard before *Morton*, J., upon a report of commissioners appointed under the statute and the exceptions of both parties to the rulings and refusals to rule of the commissioners, upon a motion of the respondent to recommit the report of the commissioners in order that they might make and report the computations called for in the requests annexed to the supplementary report of the commissioners, and upon a motion of the petitioners that the sum allowed by the commissioners to the Commonwealth for the use of the reservoir built by the Commonwealth be disallowed, and that the town be allowed a profit of fifteen per cent on the cost of the water furnished to the hospital by the town, and that as thus modified the report be accepted and confirmed. For the purpose of getting the case before the full court, the justice overruled *pro forma* the exceptions of both parties to the report, and also their respective motions, and ordered that the report be confirmed, saving to the parties all questions of law raised by the refusals of rulings by the commissioners, and by the motions made before the justice, and reported the case to the full court, such disposition to be made of it as to the full court should seem meet.

The contract under which the water was furnished was as follows:

"Articles of agreement made and concluded this twenty-third day of June in the year 1876, by and between the Commonwealth of Massachusetts, acting through the agency of the commissioners appointed under the authority of Chapter 239 of the Acts of the year 1873, entitled 'An Act to establish a hospital for the insane in the northeastern part of the Com-

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monwealth,' of the first part; and the town of Danvers acting through the agency of the commissioners of said town, chosen under authority of Chapter 191 of the Acts of the year 1874, entitled 'An Act to supply the town of Danvers with pure water,' of the second part.

"Whereas, by the 224th chapter of the Acts of the year 1876, the commissioners on the part of the State were 'authorized and empowered, with the approval of the governor and council, to enter into contract with the water commissioners of the town of Danvers for procuring a permanent supply of pure water for the state hospital for the insane, located at Danvers'; and whereas, said commissioners on the part of said town are duly authorized to make such contract on the part of the town under a vote passed at a legal meeting held for that purpose on the eighth day of May last past; and whereas, the respective boards of commissioners have agreed upon the terms of a contract; now therefore, for mutual valuable considerations, and especially in consideration of the several agreements hereinafter set forth, the State and town do hereby mutually contract and agree as follows: —

"1st. The State shall, by the first day of December next ensuing, at its sole expense construct and fully complete for the use of the town, as hereinafter stated, in a substantial, thorough and perfect manner, a reservoir of the minimum capacity of five million gallons, to be located at such place near the hospital as the State Commissioners shall determine; which reservoir shall be perpetually kept by the State at its sole expense in a perfect, safe and pure condition.

"2d. The town of Danvers is to have the perpetual right, through the agency of its said commissioners or any other authorized agents, to use such reservoir as a storage basin for a supply of water to said town and to such other places as the town may hereafter desire; and said town may at any time enter upon the hospital grounds, and do any and all acts necessary and proper for laying, examining, maintaining and repairing any pipes which it may wish to lay through such grounds to and from the reservoir, as a part of the system of the water works of the town. In the exercise of these granted rights the town shall do as little damage as may be to the land, and shall replace

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as speedily as possible the soil and fences which may be excavated or removed for the purposes named, and shall compensate the State if it shall be put to any expense by any act of the town in respect thereto. No pipes shall be laid in any direction or manner which the commissioners of the State or any of its further authorized agents shall regard objectionable as against the interest of the State. The State is to retain the exclusive possession and control of the reservoir, subject only to the rights of the town as aforesaid.

"3d. The town of Danvers shall, by the first day of December next ensuing, complete and thenceforth forever maintain its proposed water works between the sources of supply and reservoir, and perpetually thereafter keep a constant and ample supply of water in the reservoir, and permit the State to take therefrom, in any manner and at any time, all the water which the State through any of its authorized agents may desire or deem proper for the use of the hospital, and of all buildings that at any time may be owned by the State on the grounds, and also for use on the grounds themselves as now laid out, for any purposes whatever. The State may at any time, at its own expense for pipes, take water for any purposes before named directly from the pipes to be laid by the town.

"4th. Upon the introduction of the water to the reservoir by the town as stated in the last clause (3d), in a manner satisfactory to the State Commissioners, the State shall pay to the town of Danvers the sum of twelve thousand five hundred dollars, and from such time annually thereafter, for the term of twenty years, shall pay to the town the sum of one thousand dollars, as full compensation for the future supply of water for the hospital and other buildings and grounds.

"5th. At the expiration of said twenty years, the State and town shall by mutual agreement fix upon the annual water rates thereafter to be paid by the State.

"6th. The legislative acts before named may be referred to as explanatory of this agreement.

"In testimony whereof the Commonwealth of Massachusetts and the town of Danvers, through the agency of their respective boards of commissioners, have executed this agreement, as witness the hands and seals of said commissioners."

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Here followed the signatures, under seal, of the hospital commissioners for the Commonwealth and of the water commissioners of the town of Danvers.

D. N. Crowley, for the petitioners.

W. B. Sullivan, for the Commonwealth.

LORING, J. By St. 1898, c. 564, it was provided that if the town of Danvers and the trustees of the Danvers lunatic hospital failed to agree as to the amount of compensation to be paid by the Commonwealth for water supplied by that town to the hospital in pursuance of a contract between the Commonwealth and the town dated June 23, 1876, the Supreme Judicial Court, on application of either party, should appoint three commissioners to determine the sum to be paid for such water each year from December 1, 1896, to December 1, 1899. It further provided that "the award of said commissioners or a majority thereof shall be returned into said court . . . and when accepted by said court shall be final and conclusive for such term of years." The Commonwealth and the town having failed to agree, commissioners were appointed who have made an award which is now before this court on a report made by a single justice.

At the hearing before the commissioners eleven requests for rulings were made by the town and twenty-three were made by the Commonwealth. It is stated in the award that exceptions "were duly saved" to the refusal to give the rulings requested and to the rulings given. In this court a motion was made by the Commonwealth to recommit the award, with instructions to find in accordance with the rulings requested by it, and a motion was made by the town for a modification of the award and when modified for confirmation of it, and for the "cost of the reference."

We are at a loss to understand on what the commissioners were proceeding when they undertook to save exceptions to their rulings. They seem to have assumed that they were acting as masters in chancery. But if they were, they could not save exceptions to rulings of law. See *O'Brien* v. *Keefe*, 175 Mass. 274, where the nature of a proceeding before a master is explained. But they were referees and not masters in chancery, and the only questions of law open on an award made by referees

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are those referred by them to the court. *Fairchild* v. *Adams*, 11 Cush. 549. *Gillis* v. *Cobe*, 177 Mass. 584. A full statement by referees in their award of the principles of law on which they proceeded is not enough to submit to the court the correctness of those principles of law and of their application to the case. Unless it can be held as matter of construction of the award that the correctness of the law has been submitted by the referees to this court, the statement of law in the award will be taken to be a statement of what the referees have found, made for the information of the parties and not to be a reference of the correctness of it to this court. *Ellicott* v. *Coffin*, 106 Mass. 365. *Carter* v. *Carter*, 109 Mass. 306, 309. *Rogers* v. *Mayer*, 151 Mass. 279, 280. See also *Smith* v. *Boston & Maine Railroad*, 16 Gray, 521, 524.

In view of the misapprehension of the parties as to what was before the court, we have had some doubt as to whether the award should not be recommitted. But on a full consideration of the whole case we do not think it clear that there has been such a mistrial as to make that necessary in justice to the parties.

It appears from the commissioners' award that in October, 1873, Hathorne Hill in Danvers was purchased by commissioners as the site of the Danvers Lunatic Hospital. For the four years preceding, the town of Danvers had been considering the establishment of a town system of waterworks. In March, 1874, a committee appointed by the town reported in favor of taking water from Middleton Pond in the town of Middleton, with a reservoir on Wills Hill. Wills Hill is in Middleton, immediately adjoining the pond. In the same year, the Legislature gave the town a right to take the waters of this pond for a water supply. St. 1874, c. 191.

In the spring of 1875 "the commissioners for the insane hospital proposed to the committee of the town that the town should build its works in connection with the hospital and thereby save an expense to both parties, proposing to give the town the right to build the reservoir on the hospital grounds, the use of all material for the same and including the right to lay the necessary pipes" for a sum then specified. This was not accepted by the town. In May, June and July, 1875, several

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meetings of the town were held to see if the town would vote to construct a system of waterworks under the act, for a cost not exceeding $200,000, but the scheme was not adopted by the town. On April 28, 1876, the Legislature by St. 1876, c. 224, authorized the commissioners to contract with the town for a permanent supply of water for the lunatic hospital, and also gave them leave to take water from the same pond as a water supply for the hospital. After some negotiations between the town and the commissioners, the town passed a vote on May 8, 1876, authorizing its water commissioners to make a contract with some person for the construction of waterworks at and from Swan and Middleton ponds, and to contract with the commissioners of the lunatic hospital in reference to a supply of water to the hospital, "provided that the substantial effect of said contracts taken together shall be that the cost to the town of said works shall not exceed one hundred and fifty thousand dollars, . . . said works . . . to include . . . a reservoir to be placed on Hathorne Hill in Danvers instead of Wills Hill in Middleton." In pursuance of that vote, a contract was made between the town and the commissioners of the lunatic hospital on June 23, 1876, which is the contract under which the water now in question was furnished. The provisions of that contract are as follows: First. The State agreed to construct and fully complete a reservoir at its sole expense, with a minimum capacity of five million gallons, located near the hospital, "which reservoir shall be perpetually kept by the State at its sole expense in a perfect safe and pure condition." Second. The town was "to have the perpetual right" to use the reservoir "as a storage basin for a supply of water to said town and to such other places as the town may hereafter desire," with a right to lay pipes through the grounds of the hospital as part of the system of waterworks of the town. Third. The town agreed by December 1, 1896, to "complete and thenceforth forever maintain its proposed water works between the sources of supply and reservoir and perpetually thereafter keep a constant and ample supply of water in the reservoir, and permit the State to take therefrom, in any manner and at any time, all the water which the State through any of its authorized agents may desire or deem proper for the use of the hospital, and of all buildings

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that at any time may be owned by the State on the grounds, and also for use on the grounds themselves as now laid out, for any purposes whatever. The State may at any time, at its own expense for pipes, take water for any purposes before named directly from the pipes to be laid by the town." Fourth. "Upon the introduction of the water to the reservoir by the town" as agreed, "the State shall pay to the town of Danvers the sum of $12,500, and from such time annually thereafter for the term of twenty years, shall pay to the town the sum of $1,000 as full compensation for the future supply of water for the hospital and other buildings and grounds." Fifth. "At the expiration of said twenty years the State and town shall by mutual agreement fix upon the annual water rates thereafter to be paid by the State."

The town immediately made a contract with one George H. Norman, by which the waterworks were to be constructed for the sum of $162,500, and the commissioners erected a reservoir on Hathorne Hill at a cost of $37,500, or thereabouts. Upon the introduction of the water into the reservoir, the commissioners paid the town the $12,500. The twenty years during which the water rates were fixed by the contract expired on December 1, 1896, and the commissioners in their award which is now before us have fixed the rates for the three years then next ensuing.

The question to be decided by the commissioners was almost entirely, if not entirely, a question of fact. The case which they had to deal with was what was reasonably due for the services performed by the town in putting water into the reservoir on Hathorne Hill, for the use of the Commonwealth under the contract of June 23, 1876. By the contract the water was to be put into the reservoir by the town and the town was to be paid for so doing. But the parties did not agree upon the price, nor did they state in their contract what basis should be adopted in fixing the price. Stripped of detail, the case was one where the town had furnished the Commonwealth with something of value to be paid for by the Commonwealth but without an agreement as to the amount to be paid therefor. If the case is brought into court under those circumstances, the court has to find what is a reasonable price and that is almost purely an inference of

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fact. The parties and the commissioners have treated what in our opinion were questions of fact as questions of law, but on the whole we do not for this reason think that the case must go back for a further trial.

The commissioners ruled in accordance with a request made by the Commonwealth that the sum to be paid "should be based on the cost to place the quantity of water used at the hospital in the reservoir."

In making an estimate of this cost the commissioners have taken one thousand gallons as the unit, and have determined what it cost to put into the reservoir one thousand gallons of water. They first found the cost of the works outside the reservoir, and allowed interest on that amount at a fair rate; to this they added an allowance for yearly depreciation and added the operating expenses. This total cost divided by the number of gallons pumped, gave the cost per gallon, and that multiplied by the number used by the hospital gave the sum to be paid by the State, with this modification; the State was held to be entitled to a credit for the use made by the town of the reservoir.

The cost of the plant outside the reservoir was found to be $292,441.18, in place of the original contract price of $162,500. The difference is made up of $16,504 for three miles and three thousand and eighty-eight feet of distributing pipe laid when the works were built in addition to the amount called for by the contract, $1,463.26, not accounted for paid to the contractor at that time, and $49,485.16, expended at and between the pond and the reservoir since the original construction of the works, plus $62,488.76, expended between the reservoir and the houses since then, for additional distribution pipe and similar purposes. The commissioners found that four and one half per cent was a fair rate of interest; this made the interest charge $13,159.85. They found that the proper yearly allowance for depreciation was $5,618.86, and the cost of maintenance and operation $6,000, making a total of $24,778.71. The total amount of water pumped was two hundred and thirty-four million five hundred thousand gallons, making the cost of one thousand gallons .1057. The amount used by the hospital was forty-five million six hundred and twenty-five thousand gallons, which made a yearly sum of $4,822.56. From this they deducted four-fifths of the interest

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on the cost of the reservoir calculated at the same rate. They found that "the State had private and particular reasons for a reservoir of the size and location built and derives special advantages therefrom not participated in by the town," and ascertained the value of the reservoir to each party by taking the amount of water consumed by the two respectively. This they found to be as four to one. This gave the Commonwealth a credit of $1,350.

The principal contention of the Commonwealth is that it has nothing to do with the plant on the town side of the reservoir, that interest should be allowed on the cost of the plant at and between the pond and reservoir only, and that the allowance for depreciation and for operating expenses should be confined to this portion of the plant; further, that if the cost on which interest is to be charged is not so limited, interest should not be charged on the $79,092.76 ($16,504 + $62,488.76) expended for distribution pipes beyond those called for by the original contract; and that in place of being charged interest on the $12,500 contributed by the town (as it is, for this $12,500 is included in the $292,441.18) it is entitled to a credit for interest on that sum, for the same reason for which it is given a credit for interest on four-fifths of the cost of the reservoir.

The main contention of the town is that it is entitled to a profit on the water furnished the Commonwealth as it is on water furnished other water takers or consumers, and that the Commonwealth is not entitled to the credit of $1,350, given it for the use of the reservoir. It further contends that if it is to be charged for the use of the reservoir that sum should be taken into account in computing the cost of the unit of one thousand gallons. It also contends that it is entitled to interest on the three yearly payments from the end of each year.

On the main contentions of the Commonwealth and the town we see no error of law in the award.

In asking for a profit on the water supplied by it, the town in substance asks to be allowed to treat the Commonwealth on the basis on which it would have had the right to treat it if it had built a complete system of waterworks at its own expense. But that was not the case. On the contrary, it was not prepared to expend more than $150,000 on a system of waterworks, and

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a complete system cost $200,000. Under these circumstances it joined the Commonwealth in establishing this system in which the Commonwealth provided the reservoir and the town provided the rest of the plant, at a cost of $162,500, on the promise of the Commonwealth to pay it $12,500 on the completion of the plant.

The Commonwealth on the other hand, in asking to limit the town to interest on the cost of the works at and between the pond and the reservoir and to the depreciation on that portion only, and to the operation of that portion only, is asking to be allowed to stand on the same basis as if it had built a system of its own ending at the reservoir and was indebted to the town for the erection, maintenance and operation of a part of that system.

In our opinion neither contention is correct. On the contrary, it is plain that the town was not prepared to build and did not build a system of its own, but accepted the co-operation of the Commonwealth in furnishing the reservoir and in the payment of $12,500 to keep the cost of the waterworks to itself within the $150,000, to which the citizens decided to limit the town. The system of waterworks in question is a system produced by the town and Commonwealth for their joint use, and for that reason the town is not entitled to charge the Commonwealth a profit on water consumed at its hospital. It is also plain that the Commonwealth elected to come into the town system of water and was not prepared to establish a system ending at the reservoir on Hathorne Hill. After electing to come into the system it cannot ask to be treated as if a supply pipe had been constructed to the reservoir and the system had ended there. The sum reasonably due from it depends upon its share of the expense actually incurred in maintaining and operating this system of waterworks, and not on what might be calculated would have been the expense to operate a plant ending at the reservoir had such a plant been built. There is a similar if not the same reason for charging the Commonwealth with a share of the whole system that there is for charging the water taker next the reservoir the same rate charged the water taker at the end of the most remote distributing pipe.

For these reasons we are of opinion that there was no error

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of law in refusing to give the town a profit on the one hand, and on the other hand in refusing to limit it to the cost, maintenance and operation of the plant at and between the pond and the reservoir. Nor was there any error of law in including in the cost subsequent extensions of the distributing pipes. In connection with the last two of these propositions it is to be noted that the contract contemplates the possible extension of the system to other towns. It is there provided that the reservoir is to be used "as a storage basin for a supply of water to said town and to such other places as the town may hereafter desire."

We are also of opinion that the evidence as to the sums paid at the State prison and in other towns was properly excluded.

As to the contention of the town that if it is to pay for the use of the reservoir, the $1,350 paid by it should be included in estimating the cost of delivering the one thousand gallons. The question was not what did it cost to deliver one thousand gallons; it was what did it cost the town to put one thousand gallons in the reservoir. The $1,350 is paid for the use made by the town of the reservoir for water not consumed by the Commonwealth, the hospital standing the balance of interest on the cost of the reservoir, to wit, $337.50, for the use which it makes of the reservoir. We see no error of law here.

We are also of opinion that no reduction is to be made from the sum awarded by the commissioners by reason of the payment of $12,500. By the terms of the award such a reduction is to be made if "as matter of law the true construction of that clause of the contract and of the whole contract should be that the sum of $12,500 was paid as a contribution by the State towards the cost of that portion of the water works owned by the town or if it should be determined to be a sum paid in advance as water rates for the period of twenty years and forever." If this is a question of law at all, we see no error in the view taken by the commissioners, to wit, that after the period of the twenty years at any rate the Commonwealth had no interest in the plant by reason of this payment, and was not entitled to consideration by reason of it.

The Commonwealth in arguing the motion of the town to have the award recommitted for modification has pointed out that not only is it denied a credit by reason of the payment of

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$12,500, but that it is made to pay interest on this sum, for it is included in the $292,441.18 on which it is charged interest. But that question was not raised by any of the rulings requested by the Commonwealth, and does not appear to have been called to the attention of the commissioners; and for that reason it cannot be taken to be ground for sending the case back because of a mistrial. In disposing of this matter on this ground, we should add that the commissioners would be warranted in treating it as they did. It might well be taken that the $12,500 paid the town stands on a different footing from that of the $37,500 expended in constructing the Commonwealth's reservoir. For the $12,500 paid the town the Commonwealth did not stipulate in the contract for an undivided interest in the plant outside the reservoir or for the ownership of a specified portion of it. The title to the plant outside the reservoir was and is in the town, while the title to the reservoir built with the $37,500 is in the Commonwealth. The view may well be taken that on the expiration of the twenty years, if not before, the Commonwealth was not entitled to consideration by reason of this payment.

The Commonwealth's next claim is that no sum should be charged for depreciation of the town's works between the pond and the reservoir, because by the terms of the contract the town is obliged to "forever maintain its proposed waterworks between the sources of supply and reservoir." This clause in the contract is in marked contrast to the clause as to the maintenance of the reservoir; it is provided that the reservoir is to be maintained "at its sole expense." We see no error of law in this.

It appears that since the completion of the works an additional reservoir has been built on Wills Hill, and the Commonwealth claims that the cost of this should not be included in the plant on which it pays interest and on which it pays the cost of maintenance and operation. It is not stated in the report why this was built. We cannot say that it was not a proper expenditure, and no error of law appears in including it in the calculation.

The Commonwealth's next claim is to "be credited with interest on the value of the site for the reservoir." Its contention here is that as the town is allowed for land purchased and land damages paid, it is entitled to a credit for the use of its

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land. We see no error of law in omitting this. The Commonwealth already owned the land and needed a reservoir for its own use. The land for the cost of which an allowance is made to the town was purchased by it for this purpose and this purpose only.

The question of interest on the yearly sums found due has been referred to the court by the commissioners. We think that the Commonwealth is liable for interest as damages from the end of each year. The case is like *Hodgkins* v. *Price*, 141 Mass. 162.

The award being silent on the matter, the petitioners are entitled to costs before the commissioners, *Woolson* v. *Boston & Worcester Railroad*, 103 Mass. 580, but neither party is entitled to costs in this court.

The entry must be

Judgment on the award in favor of the petitioners for the sum of $10,417.68, with interest at six per cent on $3,472.56, part of said sum of $10,417.68, from December 1, 1897, and on $3,472.56, also part thereof, from December 1, 1898, and on $3,472.56, the balance of said $10,417.68 from December 1, 1899, and costs of the hearing before the commissioners.

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WILLIAM J. WILSON *vs.* CHARLES HEAD & others.

Suffolk. November 10, 1903. — January 6, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Statute, Repeal. *Wagering Contracts. Constitutional Law.*

An amendment of a statute by striking out a certain section and substituting a new one in its place has in its form no significance as tending to show a repeal of the section amended. In such a case only those parts of the original statute which are inconsistent with the amended statute are repealed by implication.

St. 1890, c. 437, as to wagering contracts was amended by St. 1901, c. 459, which confined the right to recover money paid on margins to cases where there is an affirmative intention that there should be no purchase or sale of securities and where there is no actual purchase or sale and no valid contract therefor, whereas under St. 1890, c. 437, there was a right of recovery where there was only a negative lack of intention as to performance of the contract. *Held*, that the

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amendment applies to cases pending at the time of its enactment and so applied is constitutional.

The right given by St. 1890, c. 437, to recover money paid on wagering contracts, was not a right of property belonging to persons who had brought actions under that statute and lawfully could be restricted as to pending cases by St. 1901, c. 459.

The provision of R. L. c. 8, § 4, cl. 2, that the repeal of an act shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, does not apply to the right under St. 1890, c. 437, to recover money paid on wagering contracts as restricted by St. 1901, c. 459, the statute amended being remedial and not penal.

CONTRACT, under St. 1890, c. 437, § 2, for $12,100 paid on margins. Writ dated August 6, 1898.

At the trial in the Superior Court before *Pierce*, J., the defendants contended that by reason of the enactment of St. 1901, c. 459, re-enacted in R. L. c. 99, §§ 4, 6, the action could not be maintained. At the conclusion of the plaintiff's opening, the judge ruled that as a matter of law the plaintiff was not entitled to recover, and ordered a verdict for the defendants. The plaintiff alleged exceptions. For the purpose of the argument of the exceptions, it was agreed that the plaintiff in his opening stated a case that would support a verdict for the amount claimed unless his cause of action under St. 1890, c. 437, was defeated in consequence of the enactment of St. 1901, c. 459, subsequently re-enacted in the Revised Laws.

G. F. Ordway, for the plaintiff.

S. Lincoln & R. S. Gorham, for the defendants.

KNOWLTON, C. J. The plaintiff seeks to recover under the St. 1890, c. 437, for money paid for the purchase of stocks on margin. In the opening of his case at the trial he stated and offered to prove facts which would entitle him to a verdict under that statute, were it not for the enactment of the amendatory act of 1901, c. 459.

The question before us is, What is the effect of the amendments contained in the later statute? The first section of the St. 1901 is as follows: "Section two of chapter four hundred and thirty-seven of the acts of the year eighteen hundred and ninety is hereby amended by striking out the whole of said section and substituting therefor the following," etc. The difference between the original § 2 and the section as amended is that the latter allows a recovery of payments for securities or

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commodities contracted for on margin only when the contracting party has an affirmative intention "that there shall be no actual purchase or sale," while the former allows such a recovery, not only when there is such an affirmative intention, but also when there is a mere negative state of mind in regard to the subject, that is, when he has "at the time of contract no intention to perform the same by the actual receipt or delivery of the securities or commodities, and payment of the price." There is also a proviso in the amended section limiting the recovery to cases when no actual purchase or sale of the commodities or securities, and no valid contract therefor has been made, in accordance with the terms of the contract or employment. This is simply a limitation of the right of recovery given in the original statute. The first and third sections of the original act are retained without change. The fourth section is amended by striking it out and substituting a new one in the same way as the amendment is made to the second. This fourth section relates to what shall constitute *prima facie* evidence in favor of the plaintiff, and the new one is the same as the old, except as it is changed to adapt it to the change in the second section. Except in the amendments to these two sections, there is no reference to the former statute, and it is left in full force. The question is whether these changes in two sections of the act have repealed the whole act, or any part of it, and if a part, what part? It is plain that the Legislature intended to amend the original act and not to repeal it. The form of the amendments has no significance as tending to show a repeal. The substance of the provision in regard to each amendment is that the language of the section shall be changed so as to read as follows, with the words of the new section following. The fair construction of the new statute is that the original statute shall remain in force except as it is changed by the amendments. There is no hint or suggestion of a repeal of the statute as a whole. Those parts of the original statute which are inconsistent with the amended statute, and those only, are repealed by implication. *Commonwealth* v. *Kimball*, 21 Pick. 373, 376. *Wright* v. *Oakley*, 5 Met. 400, 406. *United Hebrew Benevolent Association* v. *Benshimol*, 130 Mass. 325. *Steamship Co.* v. *Joliffe*, 2 Wall. 450, 459. *Bear Lake Irrigation Co.* v. *Garland*, 164 U. S. 1, 12. *Ely* v. *Holton*,

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15 N. Y. 595, 598. *Reid* v. *Supervisors of Albany County*, 128 N. Y. 364, 373. *Dashiell* v. *Mayor & City Council of Baltimore*, 45 Md. 615, 622. The original statute gave a right of recovery in certain cases. The effect of the amendments is to limit this right in two particulars, and thereby to take away the right in certain cases included in the former statute. Every case in which there can be a recovery under the amended statute is included in the original statute, and recovery in it could be had as well without the amendments as with them. The effect of the amendments is simply to show that, of the cases in which there is a right of recovery under the original act, those in which there is only a negative lack of intention as to performance of the contract, as distinguished from an affirmative intention that there shall be no purchase or sale, shall no longer give a right of recovery, and that those in which there is an actual purchase or sale of the securities or commodities, or a valid contract therefor, shall no longer give such a right. As to all other cases included in the original act, the law remains unchanged.

It is necessary to consider the effect of the amendments upon cases which arose prior to the enactment of the St. 1901 and which are included in the original statute, but not included in the amended statute. Did the statute create rights which vested before the amendments were in force, so that the Legislature could not constitutionally take them away? These rights were purely statutory, to recover money paid under a kind of gambling contract under which there can be no recovery at common law. *Wall* v. *Metropolitan Stock Exchange*, 168 Mass. 282, 284. As was said in *Corey* v. *Griffin*, 181 Mass. 229, 232, the statute was "intended to suppress a well known species of gambling. . . . The object is not to punish the winner nor to protect the loser as such, but simply to prevent this kind of gambling by subjecting the participants to a liability which, except for some great purpose of preventing injury to the public morals, would seem to be unfair and unjustifiable." See *Crandell* v. *White*, 164 Mass. 54. Such a statute does not give vested rights which the Legislature may not take away. When the remedy provided by the statute is lost by an amendment taking it away in certain classes of cases, nothing further of benefit remains in those cases.

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Bartlet v. *King*, 12 Mass. 537. *Nichols* v. *Squire*, 5 Pick. 168. *New London Northern Railroad* v. *Boston & Albany Railroad*, 102 Mass. 386, 389. *Louisiana* v. *Mayor of New Orleans*, 109 U. S. 285, 287. *People* v. *Livingston*, 6 Wend. 526, 530. *Van Inwagen* v. *Chicago*, 61 Ill. 31. *Bailey* v. *Mason*, 4 Minn. 546.

It is contended that the R. L. c. 8, § 4, cl. 2, which provides that the repeal of an act shall not affect "any suit, prosecution or proceeding pending at the time of the repeal for an offence committed, or for the recovery of a penalty or forfeiture incurred under the act repealed," saves the rights of parties who have claims that might be enforced under the original statute, but which are not within the amended statute. We are of opinion that this clause applies only to statutes which are strictly penal. In terms it relates only to cases in which proceedings are pending at the time of the repeal. In *New London Northern Railroad* v. *Boston & Albany Railroad*, 102 Mass. 386, 391, Mr. Justice Gray in referring to this provision which is a part of the St. 1869, c. 410, says, it "does not extend to proceedings of a civil nature." The St. 1890, c. 437, viewed in reference to the persons made liable, has features which are *quasi* penal. But it has been expressly held to be a remedial, and not a penal statute. *Wall* v. *Metropolitan Stock Exchange*, 168 Mass. 282. See also *Cole* v. *Groves*, 134 Mass. 471, 472; *Huntington* v. *Attrill*, 146 U. S. 657, 667; *Kimbro* v. *Colgate*, 5 Blatch. 229. The amendments, therefore, cut off all right of action which are not included in the statute as amended.

The case stated by the plaintiff in his opening was one that was included in the original statute but not included in the amended statute.

Judgment for the defendants.

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NASHUA SAVINGS BANK *vs.* HENRY SAYLES.

Suffolk. November 10, 11, 1903. — January 6, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Conflict of Laws. Bills and Notes. Contract, Consideration.

A bank in New Hampshire, holding an overdue note made and indorsed in this Commonwealth, asked the maker for a new note with the same indorser to take up the old one. The maker sent a new note for a smaller amount with a check for the balance, whereupon the bank returned the old note to the maker. The new note was made payable at the bank in New Hampshire and on the back was signed in blank by the indorser of the old note. Under the laws of New Hampshire a person so signing was liable as a joint maker without a demand on the other maker or a notice of his default. *Held*, that the new note first took effect as a contract when accepted with the check in payment of the old note, and was governed by the law of New Hampshire. *Whether*, if the new note had been for the full amount due on the old one, the fact that it was made payable in New Hampshire would have made it subject to the laws of that State was not considered.

The surrender of an overdue note, the indorser of which has been discharged from liability by want of notice of non-payment, is a good consideration for a new note given in part payment of the old one and signed as joint maker by the indorser of the old note, and in an action against such joint maker it is immaterial that he was not liable on the old note and received no personal benefit from signing the new one, if the plaintiff gave up the old note relying on his signature.

CONTRACT, against the indorser in blank before delivery of a promissory note, who was alleged to be liable as a joint maker. Writ dated October 14, 1902.

In the Superior Court the case was heard by *Hardy*, J. upon an agreed statement of facts. The note in suit was as follows: "No. $2000. Boston, May 31, 1890. On demand, for value received, six months after date, I promise to pay the Nashua Savings Bank, or order, two thousand dollars at the office of said bank in Nashua, N. H., with interest from date at the rate of six (6) per cent, payable semi-annually in advance. Allen S. Weeks." This note was indorsed on the back "Henry Sayles." Payments of interest also were indorsed upon it.*

The defendant never received any consideration for signing

* The same note formed part of the evidence in *Nashua Savings Bank* v. *Abbott*, 181 Mass. 531.

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either this note or the note for $2,300 mentioned in the opinion. The defendant never was indebted to Weeks but until and at the time of the death of Weeks was an unsecured creditor of Weeks to a large amount. The note for $2,300 was not presented for payment at maturity and no notice of its non-payment was given to the defendant. No notice of non-payment of the note in suit was given to the defendant as required by Pub. Sts. c. 77, § 15, (R. L. c. 73, § 16.) Under the laws of the State of New Hampshire, a person who has signed his name in blank upon the back of a note before its delivery to the payee, is liable as an original promisor or joint maker, and is not entitled to notice of a demand at maturity upon the other maker or of his failure to pay.

At the request of the plaintiff the judge ruled as follows: "The note, signed by Weeks and the defendant in Massachusetts, was delivered in New Hampshire, and by its expressed terms being payable at Nashua in that State, where also is the domicil and only place of business of the payee, the plaintiff, the contract or obligation became complete and effective under the laws of the State of New Hampshire, and is to be construed in accordance with, and is governed by, the laws of New Hampshire. Under the laws of New Hampshire the defendant was a joint maker of the note, and not entitled to notice of demand upon the other maker and his failure to pay, and is holden in this action upon the plaintiff's declaration."

The judge gave judgment for the plaintiff; and the defendant appealed.

W. A. Abbott, for the defendant.

A. S. Hall, for the plaintiff.

KNOWLTON, C. J. The plaintiff, a corporation established under the laws of New Hampshire, held an overdue note for $2,300, signed by one Weeks and indorsed by the defendant, upon which there had been no demand or notice. On May 6, 1891, more than five years after its maturity, the plaintiff's treasurer wrote to the maker in Boston, suggesting that at the time when the next payment of interest should become due, on June first, he should send a note indorsed by the defendant to take up the old one. Weeks replied immediately, saying that the defendant was away, and that he would attend to the matter

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on the defendant's return. On May 15 he wrote again to the plaintiff's treasurer, asking for a blank in the form which the bank used, and a blank was sent to him. On May 31, 1890, he sent the note in suit, for $2,000, bearing date Boston, May 31, 1890, payable at the plaintiff's bank in Nashua, New Hampshire, six months after date, and signed by Weeks, with the signature of the defendant on the back. In the letter enclosing it he wrote, "I enclose herewith a new note for the Sayles note ($2,000 instead of $2,300) and check for $360 which I believe pays the interest up to Dec. 1/90. Please send me the old note." On the receipt of the new note and the check, the plaintiff returned the old note.

Upon these facts there is no doubt that the note in suit first took effect as a binding contract when it was received by the plaintiff bank at Nashua and accepted with the check in payment of the old note. Until then the old note remained in force, and there had been no contract between the parties that took the place of it. The suggestion of the plaintiff was that a new note should be given on June 1, and this note was mailed at Boston on May 31. Nothing had been said or written by either party in regard to making the new note for a smaller sum than the old one. When the note arrived the plaintiff was at liberty to decline to accept payment in cash for a part of the old note, with a new note for the balance. It might have said, "You must give a note for the whole amount or cash for the whole." It chose to accept the note in suit, and then first the note was delivered, and then and there the contract was made. It was therefore a New Hampshire contract on which the plaintiff now brings suit, and not a Massachusetts contract. *Lawrence* v. *Bassett*, 5 Allen, 140. *Milliken* v. *Pratt*, 125 Mass. 374. *Hill* v. *Chase*, 143 Mass. 129. *Baxter National Bank* v. *Talbot*, 154 Mass. 213. It is unnecessary to consider whether under the circumstances of this case, the fact that the note was made payable in New Hampshire would also make the laws of that State applicable to it. See *Andrews* v. *Pond*, 13 Pet. 65; *Bell* v. *Bruen*, 1 How. 169; *Tilden* v. *Blair*, 21 Wall. 241; *Coghlan* v. *South Carolina Railroad*, 142 U. S. 101, 109; *Staples* v. *Nott*, 128 N. Y. 403; *New York Life Ins. Co.* v. *McKellar*, 68 N. H. 326.

Under the laws of New Hampshire a person who signs a note

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in blank upon the back, as this defendant signed, is liable as a joint maker, without a demand upon the other maker or a notice of his failure to pay it.

The defendant's contention that the note was without consideration cannot be sustained. It is immaterial that the defendant was not then liable upon the old note, and that he received no personal benefit from his signing. It is enough that the plaintiff gave up the old note for this, relying upon his signature.

Judgment affirmed.

BENJAMIN D. WOOD & another *vs.* EDISON ELECTRIC ILLUMINATING COMPANY.

Suffolk. November 11, 1903. — January 6, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Landlord and Tenant. Contract. Evidence.

A lease of real estate, under which the lessee was not bound to pay the taxes, gave the lessee an option and right to a further term of five years on giving written notice at least one year before the expiration of the first term, and within thirty days executing a written lease for the additional term, with a provision that in case of such extension the lessee should pay the taxes during the additional term. More than a year before the expiration of the first term the parties executed on the back of the lease an agreement under seal for its extension for the term of five years and eight months from the date of its expiration. The agreement of extension referred to two agreements in writing between the parties by which the lessee surrendered a part of the premises and the rent was to abate proportionally and in case the lessee should exercise the option of continuing the lease for an additional five years, he was released from paying taxes on the surrendered portion of the property. After the expiration of the original term the lessor made bills to the lessee for taxes, with the abatement agreed upon for the released portion of the premises. These bills were paid by the lessee without question for six years, including the period of extension and an additional period of occupation. Thereafter the lessee brought an action to recover the amount of taxes paid, alleging that the payments were made by mistake. *Held*, that there was evidence on which a jury could find that the plaintiff had exercised his option to have an extension of the lease and was bound by its terms to pay the taxes, except as abated by agreement of the parties; that the requirement of a notice in writing was for the benefit of the defendant and could be waived by him, and, moreover, the time for giving the notice had not arrived when the agreement of extension was executed; and that the fact that the parties made the extension run for eight months longer than five years showed merely a modification of the terms of extension which the parties might agree to; *also*, that, if there was un-

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certainty as to the meaning of the several writings taken together and applied to the situation and the circumstances of the parties, the construction put upon them by the parties as shown by their conduct might be considered and was important evidence.

CONTRACT for money paid for taxes on real estate leased from the defendant's predecessor in title. Writ in the Supreme Judicial Court dated July 6, 1901.

The case came on to be heard before *Hammond*, J., who made the ruling stated in the opinion and reported the case for determination by the full court.

During the term of the original lease the plaintiffs as lessees were not bound to pay the taxes. The lease contained the following provision mentioned by the court:

"And it is further understood and agreed that the said parties of the second part shall have the option and right of an additional and further term of Five Years of the leased premises from the expiration of the term of this lease upon the following conditions, provided that they give written notice to the parties of the first part their heirs or assigns, of such their desire at least one year before the expiration of the first term of five years and within thirty days thereafter execute a written lease of like tenor to the present lease for such additional term and in accordance with the following conditions. The Rent for such further term shall be at the rate of Thirty-nine hundred and sixty dollars ($3,960) per year with the addition thereto for each year of such sum as shall be equal to six per centum upon the value of the Northerly Dock of the leased premises as filled up or piled and planked, if so improved, such additional rent to commence from the time when such improvement shall be completed, such value not to be estimated for this purpose above one dollar fifty cents per square foot of the area of the said dock so improved. In addition to such rent the lessees or their assigns shall pay all taxes and assessments to which said premises or any part thereof may become liable during said additional term, excepting taxes with respect to said basement office, and shall pay the same annually, commencing with the year 1893, between November 1 and November 30 in each year. All water rates also to be payable by lessees."

The agreement of extension mentioned by the court was

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executed under seal on the back of the lease, and, omitting the attesting clause and the signatures, was as follows: "Boston, April 21, 1892. The term of the within lease is hereby extended to Charles Taft Chapin and Benjamin D. Wood doing business as Chapin Wood & Co., for five years and eight months from and including September 1st 1893, viz: — to May 1st 1899, upon the within described premises not released from said lease by Chapin, Wood & Co. by their agreement under seal with the Edison Electric Illuminating Company of Boston dated March 1st and April 21, 1892 and is extended for the same time upon the additions to said premises agreed upon between said parties by said agreement of April 21, 1892. This extension is made subject to the same conditions covenants and agreements so far as applicable contained in the within lease for the term thereof to expire August 31st 1893 except as affected by said agreements of March 1st and April 21st 1892."

C. H. Wardwell, for the defendant.

C. F. Kittredge & C. H. Richardson, for the plaintiffs.

KNOWLTON, C. J. The plaintiffs by assignment are the successors in title to the lessees, and the defendant is the successor in title to the lessors of a large part of Liverpool wharf in Boston, under a lease bearing date August 2, 1888, and running five years from the first day of September in that year. This lease, with certain modifications, was extended five years and eight months to May 1, 1899. The important question in the case is which of the parties was to pay the taxes on the property after the expiration of the original term. The presiding justice, for the purposes of the trial, ruled as matter of law that the lessees were not bound to pay, or in other words, that there was no evidence which would warrant the jury in finding that they were bound to pay, directed a verdict in accordance with this ruling and other rulings which are made immaterial by our decision, and reported the case to this court.

The original lease contains a provision giving the lessees an option and right to a further term of five years on condition that they give written notice of their desire at least one year before the expiration of the first term, and within thirty days thereafter execute a written lease for the additional term, of like tenor with the first, with a special provision in regard to the

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rent of a part of the property, and with a requirement that the lessees pay the taxes except upon a certain office in the basement. On March 1, 1892, the parties executed an agreement under seal in regard to a part of the leased premises, namely, the northerly dock which was then being filled by the defendant, which by the lease was to be used by the lessees when completed. By this agreement the lessees released from the leased premises a portion of this northerly dock between designated lines, and an allowance in diminution of the rent was made to the lessees for the remainder of the term, and it was further provided that if the lessees should "exercise their option to continue said lease for an additional five years as provided therein, then said Chapin, Wood & Co. shall be allowed a monthly deduction from their rent for said additional five years at the rate of sixty-seven and 32/100 dollars ($67.32) per year and be released from all obligation to pay taxes and assessments upon said portion of the northerly dock contained within the lines A, B, C, and D. This agreement in no way to affect the provisions of said lease, except as far as the payment of rent and taxes and assessments as hereinbefore provided and the portion of the premises given up as hereinbefore provided is concerned." The part within the lines A, B, C and D was the part of the northerly dock released by the lessees, and the deduction of $67.32 per year from the rental, was a much less deduction than that made for the remainder of the original term.

The lease continuing in force with this modification, the parties, less than two months later, on April 21, 1892, wrote and executed upon the back of the lease an agreement under seal for its extension for the term of five years and eight months from the date of its expiration. They agree that the lease is "extended" for the period named. The agreement states nothing about the rent, or any other terms, conditions or covenants, except by reference to the lease and to the agreement of March 1, 1892, and to another agreement of April 21, 1892, executed apparently contemporaneously with this. The agreement of April 21, referred to in the extension, is also a modification of the lease, whereby the lessees agree to give up that portion of the northerly dock included in their lease which was not given up by their agreement of March 1, 1892, and the defendant

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agrees to build out the front of Liverpool wharf a distance of thirty feet and allow the lessees to use it as a part of the leased property. There are various provisions as to the mode of use, and as to the payment of fees and percentages. The contract provides for the continuance of the use for a period of five years and eight months from the expiration of the original term of the lease. The agreement also contains this provision: "All taxes upon the 2,631 square feet of Northerly Dock hereby released and all increased taxes which shall be payable on account of additions to and improvements upon Liverpool Wharf and Northerly Dock Wharf shall be paid by said corporation" (the defendant). After the expiration of the original term the defendant made bills to the lessees for the taxes, making deductions for the tax upon that portion of the northerly dock given up by the agreement of March 1, 1892, and also upon the remaining portion given up by the agreement of April 21, 1892, and upon the improvements, and making a deduction also from the rent at the rate of $67.32 per year in accordance with the agreement of March 1, 1892, and the lessees paid these bills without question as to liability, or otherwise than as to the amount, for six years, covering the whole period of the extension and an additional period of their holding. Not until the autumn of 1899 when a controversy had arisen as to other matters and they were advised by counsel that under the writings they were not obliged to pay the taxes, did the plaintiffs ever question their obligation. They afterwards brought this suit to recover back the money as paid by mistake.

We are of opinion that the jury would have been warranted in finding that the lessees exercised their option to continue the lease, and that the written extension of the term was given and received on April 21, 1892, as and for the additional lease of like tenor, mentioned in the original lease. The original lease was treated as subsisting with certain modifications agreed to by the parties. Notice in writing from the lessees to the defendant was for the defendant's benefit and might be waived. Moreover, the time for giving it had not arrived when the extension was agreed upon, for the original term had then considerably more than a year to continue. The fact that the parties made the extension run eight months longer than the five years is of

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little significance. On the exercise of the option they all might agree upon such a modification. There is nothing in the form of the writing of extension which is inconsistent with its being given in pursuance of the exercise of an option by the lessees. It was not necessary that it should be a lease with formal covenants. It refers to the existing lease for its provisions. It adopts the changes contained in the agreement of March 1, 1892, and the other agreement of April 21, 1892. Each of these agreements assumes that the provision as to taxes, founded on the exercise of the option, is in force. Each releases the lessees from the payment of the taxes on that portion of the property which is surrendered to the defendant, and treats the lessees as bound to pay the other taxes in accordance with the language of the lease applicable to the exercise of the option. The agreement for the extension makes the agreements of March 1 and April 21, 1892 controlling as to the matters to which they relate. The agreement of March 1 purports to cover the rights of the parties as to the changed conditions for the additional term, and unless its provision is adopted there is no provision anywhere in reference to these changed conditions. It makes a provision only upon the hypothesis that the lessees exercise their option, and in that case it recognizes their obligation to pay taxes, and releases them from this obligation as to a part of the premises which they gave up, continuing by implication the obligation as to the rest of the premises. Both parties subsequently acted upon this provision for more than six years, not only as to the taxes, but also as to the deduction of $67.32 from the annual rent. All parties seem to have understood that the extension of the lease was made in pursuance of the lessees' expression of their desire and choice to continue the lease, and that the taxes were to be paid by them in accordance with the provisions of the original lease in case of renewal, subject to the modifications which released them from that obligation as to taxes assessed upon the property given up. It was a question of fact to be determined by way of inference from the papers and from all the evidence, whether the lessees exercised their option, and whether the extension of April 21 was given in pursuance of their election to continue the lease. If there was uncertainty in the meaning of the several writings taken together and ap-

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plied to the situation and the circumstances of the parties, the construction put upon them by the parties themselves may be considered, and in a case like this it is important evidence. We are of opinion that the jury might have found that the plaintiffs were bound to pay the taxes.

Judgment for the defendant on the third count, and for the defendant for the larger sum in the declaration in set-off.

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FRANCIS M. EDWARDS *vs.* GEORGE E. BRUORTON.

Suffolk. November 12, 1903. — January 6, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Constitutional Law. Boston.

The unconstitutionality of the provision for the assessment of betterments in St. 1891, c. 323, St. 1892, c. 418, relating to the location, laying out and construction of highways in the city of Boston, does not affect the validity of the other provisions of that statute.

The provision of St. 1891, c. 323, § 9, St. 1892, c. 418, § 4, that no damage occasioned by the establishment or change of grade of a highway in the city of Boston shall be recovered by the owner of a building erected within the boundaries of any way shown on any of the plans previously filed by the street commissioners under that statute, and not removed at the expense of the owner on notice from the commissioners, is unconstitutional and void, but its unconstitutionality does not affect the validity of the other provisions of that statute, relating to the location, laying out and construction of highways in that city.

CONTRACT for alleged breach of the covenants in a deed, conveying two parcels of land on or near Audubon Road in the city of Boston. Writ dated April 15, 1903.

In the Superior Court the case was heard by *Mason*, C. J., without a jury. He refused the defendant's requests for rulings, and found for the plaintiff in the sum of $14,500. The defendant alleged exceptions, raising the questions stated by the court.

B. D. Barker, for the defendant.

O. O. Partridge, for the plaintiff.

KNOWLTON, C. J. This is an action of contract for breach of a covenant in a deed. A public street called Jersey Street was laid out by the street commissioners of Boston, over a part

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of the premises, under the authority of St. 1891, c. 323, and the St. 1892, c. 418, and other amendatory acts, and the existence of this street constitutes a breach of the covenant in the deed if the statute gave the board authority to lay it out. It is contended that the statute is unconstitutional in two particulars, first, that it purports to authorize an assessment of the whole cost of construction as a betterment tax upon property benefited, without reference to the amount of the benefits; and secondly, because in § 9 it provides that no compensation shall be given for land taken for a street, if the owner, after the filing of a plan in accordance with the statute, shall erect any building within the boundaries of any way and not remove it when required by the street commissioners. It is further contended that these unconstitutional provisions render the entire statute void.

It has been held repeatedly that the statute is unconstitutional in that part which directs an assessment upon abutters, because the assessments are to be made without reference to benefits received. *Lorden* v. *Coffey*, 178 Mass. 489. *White* v. *Gove*, 183 Mass. 333. *Harwood* v. *Street Commissioners*, 183 Mass. 348. The question now before us is whether this is a defect which renders the whole of the statute unconstitutional, or only that part of it which provides for the assessment. The general rule of law applicable to the question is familiar. It is that if the different parts of a statute are separable, so that the part which is unobjectionable can well stand alone, and if it is so far independent of the part which is unconstitutional that the Legislature presumably would have enacted it without the other, if they had known that the other was unconstitutional, the act can be given effect in the part which is unobjectionable and set aside only in the other part. If, on the other hand, the valid and invalid parts "are so mutually connected with and dependent on each other . . . as to warrant a belief that the Legislature intended them as a whole, and that, if all could not be carried into effect, the Legislature would not pass the residue independently, . . . all the provisions which are thus dependent . . . must fall." *Warren* v. *Mayor & Aldermen of Charlestown*, 2 Gray, 84, 99. *Fisher* v. *McGirr*, 1 Gray, 1, 21. *Commonwealth* v. *Clapp*, 5 Gray, 97, 100. *Commonwealth* v. *Hitchings*,

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5 Gray, 482, 485, 486. *Sparhawk* v. *Sparhawk*, 116 Mass. 315, 320. *Nolan's case*, 122 Mass. 330. *White* v. *Gove*, 183 Mass. 333. The cases in which the doctrine has been applied are numerous, and some of them present difficulties of determination upon the question whether the valid and invalid parts of the statute are essentially and inseparably connected in substance. In statutes providing for the expenditure of money for the benefit of the public, containing an unconstitutional provision for raising money by taxation, it has been held in different jurisdictions that the invalid part may be disregarded and the substantial part enforced, leaving payment to be provided for in a constitutional way. This was decided in *Loeb* v. *Columbia Township*, 179 U. S. 472, a case in which an avenue was widened under a statute providing that the cost should be assessed on the abutters, which was assumed to be unconstitutional in that particular. A similar application of the principle is found in *Gordon* v. *Cornes*, 47 N. Y. 608, 617, *Matter of Oneida Street*, 37 App. Div. (N. Y.) 266, *Skaneateles Water Works Co.* v. *Skaneateles*, 161 N. Y. 154, 170, *Sparrow* v. *Commissioner of State Land Office*, 56 Mich. 567, 572, *State* v. *District Court*, 66 Minn. 161, 165, *Huntington* v. *Worthen*, 120 U. S. 97, 102, and *People* v. *Knopf*, 183 Ill. 410, 422. A few of the analogous cases dealing with subjects other than taxation are *Cole* v. *County Commissioners*, 78 Maine, 532, 538, *New England Engineering Co.* v. *Oakwood Street Railway*, 75 Fed. Rep. 162, 167, and *Field* v. *Clark*, 143 U. S. 649, 692, 697. Cases dealing with the general question, in which the whole statute was held void, are *Warren* v. *Mayor & Aldermen of Charlestown*, 2 Gray, 84, 99, 100, *Nolan's case*, 122 Mass. 330, *Meshmeier* v. *State*, 11 Ind. 482, 485, *Slauson* v. *Racine*, 13 Wis. 398, 404, *State* v. *Montgomery*, 94 Maine, 192, *Copeland* v. *St. Joseph*, 126 Mo. 417, and *Reelfoot Lake Levee District* v. *Dawson*, 97 Tenn. 151.

The cases first cited, in their application of the principle, fully cover the case at bar. The defective part of the statute with which we are now dealing, relates only to the mode of taxation by which the money shall be raised to pay for the streets laid out and constructed. It provides an unconstitutional mode of special taxation. If that mode cannot be adopted, it is not to

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be presumed that the Legislature intended that no street should be laid out under the statute. If streets are needed and laid out they can be paid for by general taxation, or a proper mode of special taxation can be prescribed. In this Commonwealth it never has been held or intimated by the court that a defect in the mode of taxation prescribed for meeting the expense of constructing a street or sewer should render the whole proceeding invalid. The contrary has always been assumed. In *Harwood* v. *Street Commissioners*, 183 Mass. 348, it was assumed in terms in reference to the statute now before us. See also *Weed* v. *Mayor & Aldermen of Boston*, 172 Mass. 28; *Hall* v. *Street Commissioners*, 177 Mass. 434; *Stark* v. *Boston*, 180 Mass. 293. The unconstitutionality of the provision for the assessment of betterments does not affect the validity of other parts of this statute.

The act provides compensation for persons whose land is taken for a street. St. 1891, c. 323, § 10. St. 1892, c. 418, § 5. It creates an exception to this general provision by declaring that if a building is erected within the boundaries of any way shown on any of the plans after the filing of the plan in accordance with the statute and not removed at the expense of the owner when required by the board of commissioners, no damage to the estate on which the building is, occasioned by the subsequent establishment or change of grade of any highway, shall be recovered by or paid to the owner of the estate. St. 1891, c. 323, § 9. St. 1892, c. 418, § 4. This was intended to prevent any use of property inconsistent with the plan after the filing of a plan and before the laying out of a way. If it could have that effect it might materially interfere with the use which an owner might desire to make of his estate for many years, after the filing of a plan and before the laying out of a way. The statute prescribes no compensation for this interference with private property. The Legislature cannot constitutionally so interfere with the use of property without giving compensation to the owner. This was held in reference to a similar statute in *Forster* v. *Scott*, 136 N. Y. 577, 583.

In the act before us there is no express prohibition of the owner's use of his property; but it is declared that if he uses it otherwise than in accordance with the plans of the street commissioners it may be taken from him for a way without giving

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him compensation. This attempt to except him from the general rule in regard to the taking of property under the right of eminent domain is unconstitutional and ineffectual.

Here again we have the question whether the defect defeats the whole statute. It is connected with the scheme of the act as the assessment of betterments is connected with it, but we do not think it is so closely connected with it as to have been deemed by the Legislature an essential part of it. Without such a provision the filing of the plans would be likely in most cases to guide the owners in making erections upon their property. This unconstitutional part of the law is an exception which stands by itself. If the law is administered without it, the only change from the original enactment is that a person who has built, in the manner described, will receive his damages when the land is taken for a street, instead of being left without compensation. Although the subject is not free from difficulty, we are of opinion that this part of the act should be held so far separable from the other portions as to leave the remainder valid.

The two unconstitutional parts have no connection with each other, and although the fact that the statute is defective in these two particulars instead of in only one strengthens the argument against holding the other parts valid, we do not think it makes the argument insuperable.

We are of opinion that the street laid out became a legally located public way, and that its existence constitutes a breach of the covenant in the deed.

Exceptions overruled.

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HIRAM P. HARRIMAN & another *vs.* THEODORE H. TYNDALE, administrator.

Suffolk. November 13, 1903. — January 6, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Equity Jurisdiction, Specific Performance, Charge on proceeds of land. *Executor.*

The right of a vendee to enforce specifically a contract for the sale of land, by compelling a conveyance, is not affected by the fact that the vendor's title was imperfect when the contract was made, if later it became adequate.

It is not within the power of an administrator *de bonis non* with the will annexed of an insolvent estate, to stipulate that an arbitrator under R. L. c. 194, may award damages on a claim against the estate for the conveyance of certain real estate as a preferred claim under R. L. c. 142, § 30, but if the real estate in question has been turned into money by an agreement of the parties, with a stipulation that the claim shall be paid from the fund, the fund properly is chargeable in equity with the damages which are allowed.

SUBMISSION TO ARBITRATION under R. L. c. 194, signed by Hiram P. Harriman, Stephen Jennings, and Theodore H. Tyndale, administrator *de bonis non* with the will annexed of the estate of Micah Dyer, Jr., dated October 25, 1902. Hosea M. Knowlton, Esquire, was named in the submission as arbitrator. After his death the parties by agreement in writing stipulated that F. Rockwood Hall, Esquire, should be arbitrator in place of Mr. Knowlton. The arbitrator found that the claim of the plaintiff Harriman took precedence of that of the plaintiff Jennings, and made an award that the plaintiff Harriman be paid from the estate of Micah Dyer, Jr. by the defendant Tyndale, administrator, as a preferred claim, the sum of $16,353.64.

In the Superior Court the case was heard by *Hardy*, J. on a motion of the plaintiff Harriman that judgment be entered in his favor in accordance with the arbitrator's report. The judge overruled objections of the defendant to the arbitrator's report, called exceptions, and confirmed the report and award. He refused the defendant's requests for rulings, and allowed the motion for judgment. The defendant alleged exceptions which the judge allowed as follows:

"In the above case objection was made to my allowance of the

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exceptions on the ground that only by an appeal the defendant was entitled to present his claim to the Supreme Judicial Court, and that the court of last resort would have no right to consider the questions the defendant desires to raise on a bill of exceptions, but I overrule such objection of the plaintiffs, and have allowed the exceptions, notwithstanding such objections."

The defendant appealed from "the finding of the judge confirming the report of the arbitrator."

The contract for the sale of real estate which the plaintiffs sought to enforce was as follows:

"Know all men, that I, Micah Dyer, jr., of Boston, in the county of Suffolk and Commonwealth of Massachusetts, in consideration of one dollar and other valuable considerations paid by Alfred A. Marcus, of said Boston, the receipt whereof is hereby acknowledged, do hereby agree to convey, or cause to be conveyed, to said Alfred A. Marcus, his heirs or assigns, estate number ninety-four (94) Essex street, in said Boston, together with whatever may be due from the city of Boston, for damages occasioned by the taking of a portion of said estate heretofore, and which suit is now pending against city, upon the payment to me by the said Alfred A. Marcus, his heirs or assigns, of the sum of forty-five thousand dollars ($45,000) and the interest on two mortgages, one of $18,000 and one of $12,000, said interest due for a time not exceeding five months, also the taxes of the year 1895; upon the condition that one thousand dollars ($1000) of said amount shall be paid on or before March 12, 1896, at which payment the payment of the balance may be extended to April 13, 1896, when, if $4000, four thousand dollars, more is paid, the payment of the balance may be extended to June 12, 1896; the said Marcus, his heirs or assigns, to pay all expenses of the law suit against the city of Boston for said damages. The deed of said premises to be given to be dated the twelfth day of March, eighteen hundred and ninety-six. Witness my hand and seal this fifth day of March, eighteen hundred and ninety-six. Micah Dyer, jr."

"In consideration of one dollar and other valuable considerations to me paid, I do hereby assign and transfer all my rights under the foregoing agreement to Witness my hand and seal this day of March, A. D. 1896. Alfred A. Marcus."

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The following facts, among others, were found by the arbitrator:

Micah Dyer, Jr. (called in this statement "Micah"), died on November 24, 1897, testate. His son, Walter, was appointed the executor of his will, but subsequently was removed, and Mr. Tyndale, the defendant, was appointed administrator *de bonis non*, with the will annexed, of the testate's estate, which was represented and declared insolvent.

On June 8, 1893, one Fitzgerald, called in the record a "straw man" for Alfred A. Marcus and his son Simeon, acquired the title to No. 94 Essex Street, Boston, subject to two mortgages, — one of $18,000, then held by the Warren Institution for Savings, and the other of $12,000, held by Reuben E. Demmon; and, on the same day, Fitzgerald executed a mortgage for $30,000 on the property to Julia K. Dyer, wife of Micah, as security for a note of A. A. Marcus and Son for $17,000, then held by Micah. This mortgage was Micah's property, placed in his wife's name from "motives of prudence or convenience," and, on February 25, 1895, was assigned by her to one Ruggles, and by Ruggles to Micah, the assignment, however, not being recorded until February 20, 1897.

On March 5, 1896, and while Micah held the unrecorded assignment of the $30,000 mortgage, he signed and delivered to Marcus the contract above quoted, by which he agreed to convey, or cause to be conveyed, to Marcus, his heirs or assigns, 94 Essex Street, upon payment of $45,000 and certain additional sums, on condition that the payments were made at the times and as therein stated. Marcus made the first payment of $1,000 on March 12, and immediately assigned the agreement to his counsel, Mr. Harriman, who had advanced the $1,000. Julia K. Dyer, wife of Micah, was adjudged an insolvent debtor on February 25, 1895, and Mr. Harriman was appointed assignee of her insolvent estate. Soon after the delivery of the agreement, Micah attempted to get the title to No. 94 Essex Street by foreclosure of the $30,000 mortgage; but Mr. Harriman, claiming the mortgage as assignee of Julia's insolvent estate, brought a bill in equity, upon which he obtained an injunction restraining the foreclosure sale. This was on April 2, 1896, eleven days before the payment of $4,000 was required to be made.

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On April 13, Marcus, accompanied by Harriman, called at Micah's office and tendered the $4,000. Micah refused to accept it, because, as he said, and Marcus and Harriman believed, the injunction prevented Micah from carrying out the agreement. Micah was then willing to perform, and promised to do so when the injunction was dissolved. It was not dissolved until February 2, 1897. Marcus then did not have actual knowledge of the dissolution of the injunction, but Harriman did. Mr. Harriman was counsel for Marcus in this matter before the agreement was signed and until late in the month of March, 1897.

On February 21, 1897, Micah assigned this mortgage to Charles R. Batt in trust (1) to secure the National Security Bank for advances in Julia's composition in insolvency, and (2) to convey to his son Walter. Batt foreclosed the mortgage on March 18, 1897, and caused the premises to be bid in, subject to the mortgages of $18,000 and $12,000. Marcus knew of the foreclosure sale, and to enable Micah to collect damages from the city of Boston occasioned by the widening of Essex Street, delivered to Micah, or there was delivered with his knowledge and consent to Micah, a deed of the premises, in which no grantee's name appeared. This deed was never recorded, nor did it appear that any name was ever inserted as grantee. Batt conveyed this property to Walter on July 2, 1897, in accordance with the trust deed, and Walter took the title with full knowledge of the agreement between his father and Marcus. Soon after his appointment Tyndale brought suit against Walter to recover several parcels of land, including 94 Essex Street, on the ground that they were conveyed by Micah when insolvent without valuable consideration and with the intent to hinder, delay and defraud creditors. This suit was referred to a master who sustained Tyndale's contention in part and found and reported that Walter held No. 94 Essex Street and certain other lands upon a secret trust, and that he ought to convey them to Tyndale.

While this suit was pending, and after the master's report was filed, but before a hearing upon it, Tyndale arranged a settlement with Walter, by the terms of which he was to receive a certain sum of money and to release Walter from all claims of the estate. Having arranged this settlement, Tyndale petitioned

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the Probate Court for leave to compromise, and a citation issued upon his petition and was duly served. Harriman entered his appearance to oppose the petition, as attorney for Jennings, but withdrew his appearance on October 28, 1902, when a decree authorizing the compromise was entered. After the master's report was filed, and before the compromise was effected, Jennings brought a bill in the Superior Court against Tyndale, Walter Dyer, and Walter's wife, Martha, to enforce specifically the contract above quoted, and in this bill offered to pay the full consideration due, and otherwise to perform.

The following stipulation was executed by the parties to the submission: "In the matter of the claims or demands submitted to Hosea M. Knowlton, Esquire, between the above-named parties, it is agreed and stipulated that the discharge and dismissal of the suit pending between Alfred A. Marcus and Walter R. Dyer, in relation to the property No. 94 Essex street, and the dismissal or other entry in the bills in equity pending between said Theodore H. Tyndale, as administrator as aforesaid, and Walter R. Dyer *et als.*, in the Superior Court for the county of Suffolk, shall not in any way affect the rights of the parties to said submission to arbitration before mentioned, pending before Hosea M. Knowlton, the matters submitted before said Hosea M. Knowlton to be determined by him as though none of the above-mentioned suits or actions had been terminated or dismissed subsequent to the date of said submission."

W. B. French, (*E. L. Curtiss* with him,) for the defendant.

H. P. Harriman & H. E. Perkins, for the plaintiffs.

KNOWLTON, C. J. The parties submitted the demands of the plaintiffs against the defendant under a writing which the plaintiffs contended gave them a right to specific performance of a contract for the sale of real estate, and all other demands of either party against the other, to arbitration under the R. L. c. 194. The arbitrator made a report in favor of the plaintiffs and reserved certain questions of law for the court. Exceptions also were taken in the Superior Court. It is necessary now to consider only the questions argued by the defendant at the hearing in this court.

The contract relied on was for the sale of real estate, and it entitled Marcus, with whom it was made, to a good title to the

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property if he complied with the conditions as to payment. *Mansfield* v. *Hodgdon*, 147 Mass. 304. *O'Brien* v. *Boland*, 166 Mass. 481. The plaintiffs have succeeded to all rights which Marcus had under this contract. The first payment of $1,000 was made by Marcus under the agreement, and the second payment of $4,000 was tendered when it became due. The refusal of the defendant's testator to receive it, with his statement of his willingness to accept the money and carry out the agreement on the removal of the injunction, and his promise to Marcus to let him know as soon as the injunction was dissolved and he was free to make the conveyance, absolved Marcus from the duty of making or tendering payments until he should receive further information from the testator. The subsequent knowledge of Harriman that the injunction had been dissolved, obtained while he was acting officially in an independent capacity as the assignee in insolvency of Julia K. Dyer, did not affect the rights of Marcus in this particular. As the plaintiff Jennings has a conveyance of all Marcus's rights from the trustee in bankruptcy of Marcus's estate, his claim here is as good as Marcus would have had if he had not become a bankrupt. The previous conveyance of the claim by Marcus to Mr. Harriman, to be held as collateral security for a debt, leaves Marcus's representative with a right to have it treated in this proceeding as if no such conveyance had been made, except that the proceeds of it are applicable in the first instance to the payment of Mr. Harriman's debt, for whose security it is held. The fact that a deed for the equity of redemption was given by Fitzgerald for the special purpose of promoting a settlement of the claim for damages against the city of Boston, which deed was never recorded, did not operate as a waiver and discharge of Marcus's rights under the contract. It is at most a part of the evidence in the case.

We come now to the most important question before us, namely: Whether the arbitrator might find that the plaintiffs were entitled to specific performance as against the defendant. In considering this question we are to treat the case as if the defendant had not settled his suit against Walter R. Dyer, the holder of the title; for there is a stipulation of the parties that the matters submitted are to be determined by the arbitrator as if "none of the above-mentioned suits or actions (including this

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suit) had been terminated or dismissed subsequent to the date of said submission." The arbitrator has found facts which show that if this suit had not been settled by a payment of money, the defendant would have been entitled to a conveyance of the real estate from Walter R. Dyer, who held it by a title fraudulent as against the testator's creditors, with full knowledge of the facts on which the present plaintiffs' claims are founded. A master's report had been made in favor of the plaintiffs. If the suit had been prosecuted to a final decree and a conveyance had been made under the decree, the defendant would have been in a position which would have enabled him specifically to perform the contract relied on by these plaintiffs. We are to decide the question as if the defendant's rights had not been changed by a settlement of the suit to obtain the property from Walter R. Dyer and by a substitution of money for real estate which this defendant otherwise would have obtained. Previously to his death the defendant's testator had controlled the title, and had caused it to be conveyed to his son Walter R. Dyer to be held for his benefit. The defendant, representing the testator and his creditors, could control it after his appointment. It is immaterial that the testator's title was imperfect when the contract was made, if it became adequate before the time for the decision in this case. It is a vendee who is seeking performance, and not a vendor proceeding against a vendee who has declined to accept the property because the title was not good. The objection, therefore, that the defendant had not such a title as was necessary to warrant a decree for specific performance, cannot prevail. *Dresel* v. *Jordan*, 104 Mass. 407, 414, 415 and cases cited. *Richmond* v. *Gray*, 3 Allen, 25. *Barnard* v. *Lee*, 97 Mass. 92.

In the agreement for arbitration the parties stipulated that if the arbitrator awards damages, judgment on the award shall have the same effect as is provided by R. L. c. 142, § 30, in the case of a judgment against the insolvent estate of a deceased person. The arbitrator has accordingly awarded that Mr. Harriman shall be paid from the estate of Micah Dyer the sum of $16,353.64 as a preferred claim. The estate was insolvent, and it was not within the power of the administrator *de bonis non* with the will annexed to stipulate, as between different classes of creditors, that a claim of this kind should be allowed as a pre-

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ferred claim under the R. L. c. 142, § 30. It was a claim for a conveyance of real estate, and if the real estate was turned into money by an agreement of the parties, with a stipulation that this claim should stand against the fund, to be paid from it in money, the fund is properly chargeable in equity with the damages which are allowed. R. L. c. 148, § 1. *Root* v. *Blake*, 14 Pick. 271. *Boyd* v. *Soule*, 8 Gray, 554. Perhaps it is to be assumed that, in the settlement of the suit against Walter R. Dyer, the defendant received, on account of the real estate, a sum as large as the amount here found in favor of the plaintiffs. If so there is no question that the fund so obtained is chargeable with the payment of the full amount of this award, and in this sense the award may be called a preferred claim. If there is a deficiency in this fund, what rights these plaintiffs will have to other property of the estate, as against other creditors, preferred or unpreferred, cannot be determined in this case.

Judgment affirmed; exceptions overruled.

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JOHN CONNESS *vs.* COMMONWEALTH.

Suffolk. November 16, 17, 1903. — January 6, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Evidence, Of value of real estate.

On a petition for the assessment of damages for land taken by the metropolitan park commissioners under St. 1893, c. 407, mechanical engineers, familiar with the use of steam and water power and with mills of various kinds, but having no knowledge of the prices of land bought and sold in the vicinity of the land taken, except for manufacturing purposes, were allowed by the presiding judge to testify that the petitioner's land was well adapted for a mill site and to give their opinion of its fair market value for a particular kind of mill. There was testimony on both sides as to the value of the petitioner's land from persons familiar with the prices at which land was sold in the vicinity. *Held*, that, although the testimony of the mechanical engineers was objectionable and it would have been a better exercise of judicial discretion to have excluded it, the court could not say that there was no evidence in the case on which the presiding judge might find these witnesses qualified to aid the jury in fixing the market value of the property.

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PETITION, filed September 29, 1900, for the assessment of damages for the taking by the metropolitan park commissioners under St. 1893, c. 407, of two parcels of land in that part of Boston called Dorchester.

At the trial in the Superior Court before *Bell*, J., the jury returned a verdict for the petitioner in the sum of $12,000 with interest from the date of the taking. The respondent alleged exceptions.

R. G. Dodge, Assistant Attorney General, for the Commonwealth.

M. Storey, for the petitioner.

KNOWLTON, C. J. The questions in this case relate to the admissibility of the testimony of two witnesses, called by the petitioner as experts to testify in regard to damages to real estate. One of them, so far as appears, had no knowledge of the prices at which land was bought and sold in the vicinity of the land taken by the respondent, and hardly any knowledge of the prices of land in other places. The other testified that he was "perfectly familiar with values in Dorchester and other places around Boston for manufacturing purposes, but not for any other purposes, and had nothing to do with any other purposes." Both of these witnesses were mechanical engineers who were familiar with the use of steam and water power and with mills of various kinds in many places. They were competent to give an opinion on the question whether the petitioner's property was adapted to use as a site for a mill, but their testimony tended to show that they had been occupied chiefly with mechanical subjects in connection with mills, rather than with prices or values. After they had testified that the petitioner's property was well adapted for a mill site, one of the witnesses was allowed to answer the question, "What is the fair market value of this combination of the land here with the water for the purposes of the rubber business?" and to say that it would be worth $50,000 for such a mill site. The other witness gave similar testimony. The respondent objected to the questions and answers, both in form and substance, and saved exceptions.

The subject thus presented was considered in *Cochrane* v. *Commonwealth*, 175 Mass. 299, and similar questions have arisen in previous cases. The sum to be awarded for real estate taken

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is the fair market value of the property, having reference to all the uses to which it is adapted. Its value for any special purpose is not the test, although it may be considered, with a view of ascertaining what the property is worth in the market for any use for which it would bring the most. *Moulton* v. *Newburyport Water Co.* 137 Mass. 163, 167. *Providence & Worcester Railroad* v. *Worcester*, 155 Mass. 35, 42. *Teele* v. *Boston*, 165 Mass. 88, 92. *Maynard* v. *Northampton*, 157 Mass. 218, 219. *Fales* v. *Easthampton*, 162 Mass. 422. *Butchers' Slaughtering & Melting Association* v. *Commonwealth*, 169 Mass. 103, 118. In the case first mentioned, while it was decided that there may be trials in which it is necessary to receive the testimony of witnesses who have little or no knowledge of prices in the neighborhood where the taking occurred, some of the objections to such testimony were mentioned, and it was said that "for these reasons, the usual rule should be departed from and testimony of this kind admitted only when without it it is impossible to prove the value of the property in question." Such testimony is almost necessarily affected largely by the peculiar conditions and the nature of the management of some particular business with which the witness is acquainted. In the present case the first witness testified that he "knew by personal experience the expense of running and the profits of a rubber works, because in the Boston Belting Company case he had been employed to go over the entire expenses and profits of the business of the Boston Belting Company for seventeen years." We suppose this refers to an examination of the books and papers of a company which may have been very exceptional in its management and its profits. So, too, the market value for any particular use may be largely affected by the selling price of land in the vicinity. The question is not what a manufacturer could afford to give for a site if he could not get it at a less price, or could not get another at a lower rate, but what the property will bring in the market, in view of the great or small demand for it, and the condition of the market as to supply and demand in other places where the proposed business might as well be carried on. Ignorance of the market price of land in the vicinity leaves the testimony of mechanical engineers and mill managers of little worth as to market

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values. Because of these and other considerations, we deem such testimony very objectionable, and we think the proposition quoted above from *Cochrane* v. *Commonwealth* should be treated as a rule of practice, and followed pretty strictly.

In view of the fact that "it was not claimed by the petitioner that it would be practicable to use the stream directly for water power on the petitioner's land, but only that he could take water from the river for steam and other manufacturing uses other than power," and the further fact that under the reservation in the taking, the owner of the part of the land which is left will have a right to take water from the river in any reasonable manner and to the same extent as heretofore for mercantile or manufacturing purposes, and to discharge the water into the river; and in view of the ignorance of these experts of the selling prices of land in the vicinity, and the introduction of many witnesses on both sides who were familiar with the prices at which property sold in that part of Dorchester, although they did not know the value of mill sites, we think it would have been a better exercise of judicial discretion if the testimony of these two witnesses as to values had been excluded. On the other hand, the questions which arose in passing upon the competency of the evidence at the trial were questions of fact, and we cannot sustain the exceptions if there was any evidence to warrant the view taken by the presiding judge. *Amory* v. *Melrose*, 162 Mass. 556, 557. *Commonwealth* v. *Sturtivant*, 117 Mass. 122, 137. He might find that the land had elements of value as a mill site. There was no testimony before the court in regard to the selling price of mill sites as such. The evidence tended to show that the experience of these witnesses enabled them to judge of the value of a mill site somewhat better than persons generally. We cannot say that there was no evidence on which he could find the qualifications of these witnesses to be such as might enable them to aid the jury in fixing the market value of the property, under the findings which he might make, and which the jury subsequently might make as to its condition and qualities. Notwithstanding the objections to such testimony, there was evidence on which it could be admitted in the discretion of the presiding judge, and the entry will therefore be,

Exceptions overruled.

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ADA A. BROCK *vs.* MARY E. ROGERS.

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Suffolk. November 17, 1903. — January 6, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Deceit. Guardian. Estoppel.

A guardian cannot maintain in his own name an action of tort for false representations whereby his ward suffered damage. The fact that since the bringing of the action the ward has died and the plaintiff has inherited his property is immaterial.

One, who by leave of court sells and conveys as guardian land standing in the name of his ward is estopped to set up an adverse title to the land in himself.

TORT for alleged false and fraudulent representations, whereby the plaintiff was induced to exchange an equity of redemption of certain real estate numbered 19 on Camden Street in Boston for a mortgage for $2,500 on certain land in Newton. Writ dated September 20, 1898.

At the opening of the trial in the Superior Court before *Gaskill*, J., before any evidence was introduced, it was stated by counsel and admitted for the purposes of this action to be true, that the equity of the property on Camden Street had stood in the name of Roy E. Brock, a minor son of the plaintiff for whom she was guardian, and that induced by the representations of the defendant, alleged to be false, the plaintiff obtained leave from the Probate Court to sell the property as guardian for $2,500, and thereafter conveyed it to the defendant's nominee by a guardian's deed in the usual form. The plaintiff contended that, although the legal title to the property stood in the name of Roy E. Brock, the property was her own and she simply had placed it in the name of her son. She also offered to prove that since the bringing of this action Roy E. Brock had died and that the plaintiff was his sole heir at law, she being a widow and he her only child, and that there were no creditors.

The judge ruled that the present action could not be maintained by the plaintiff in her own name, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

C. F. Eldredge, for the plaintiff.

F. Rogers & C. C. Long, for the defendant.

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BRALEY, J. At the time when the alleged false representations were made by the defendant the title to the property was in Roy E. Brock, a minor son of the plaintiff and of whose person and estate she was the duly appointed guardian; and all the proceedings in conducting and making the sale, and conveying the land to the defendant, were undertaken and completed by her as such guardian under a license from the Probate Court authorizing the sale of the ward's estate; and in which she had no legal interest. *Chapin* v. *Livermore*, 13 Gray, 561, 562. *Rollins* v. *Marsh*, 128 Mass. 116, 118. *McKim* v. *Mann*, 141 Mass. 507, 508. *Lombard* v. *Morse*, 155 Mass. 136, 137.

In order to maintain an action for deceit the plaintiff must not only allege and prove the falsehood and fraud, but also that thereby she has suffered damage. *Tryon* v. *Whitmarsh*, 1 Met. 1, 6.

If the defendant made the representations as alleged in the declaration, in which the case is put on the sole ground that it was the plaintiff's property which was obtained by the fraud of the defendant, the plaintiff wholly fails to prove that by reason of the representations, she had been induced to part with any property belonging to her, and she has no cause of action.

It appears that since this action was brought her son has died, and that she is his only heir at law. But this event cannot operate retroactively to vest her with a title to the real estate as of the date of sale. She takes as his heir at law, and becomes such only on his death.

Upon the death of the ward the authority of the guardian ceases and the only duty that remains is to settle his accounts and turn over any property in his possession to the rightful heir. *Richmond* v. *Adams National Bank*, 152 Mass. 359, 364. Besides the defendant bought from the plaintiff as guardian and the grantee in the deed took the title of her ward to the land, and she is now estopped to set up in her own right in this action an adverse claim of title in herself, for the purpose of laying a foundation upon which to rest an action of tort for the defendant's alleged deceit at the sale. *Heard* v. *Hall*, 16 Pick. 457, 461.

The ruling at the trial that the present action could not be maintained by this plaintiff in her own name was right.

Exceptions overruled.

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H. THEODORE FLETCHER *vs.* GEORGE L. WRIGHTON.

Suffolk. November 17, 1903. — January 6, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Attachment. Execution. Officer.

The provision of R. L. c. 167, § 70, that an attachment of mortgaged personal property shall be dissolved if the amount secured by the mortgage is not paid within ten days after demand, applies only to a valid mortgage, and in an action against the attaching officer for an alleged conversion of the mortgaged goods where no such payment was made, the officer can show that the mortgage was voidable by attachment.

If, in an action against an officer for an alleged conversion of goods sold by the defendant on execution, the defendant cannot prove a lawful attachment in justification of his acts without a return of the execution into court, such a return may be made at any time before the execution is received in evidence.

TORT by a mortgagee of personal property against a constable for the alleged conversion of the mortgaged property attached and sold on execution by the defendant. Writ dated September 22, 1900.

At the trial in the Superior Court before *Bond*, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

H. T. Richardson, for the plaintiff.

S. H. Tyng, (*A. T. Johnson* with him,) for the defendant.

KNOWLTON, C. J. This is an action of tort for the alleged conversion of certain goods of which the plaintiff was a mortgagee. The defendant justifies his interference with the property by saying that he attached it as a constable under a writ against the mortgagor, and subsequently sold it upon the execution issued in the case. The contentions relied on by the plaintiff are two: first, that inasmuch as the writ was not a trustee process and the attachment was made under the R. L. c. 167, § 69, and the amount demanded by the plaintiff as due him under the mortgage was not paid within ten days, it is not open to the defendant to contest the validity of the mortgage; second, that inasmuch as the defendant did not return the execution into court within sixty days, nor until after he first offered it in evidence

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at the trial before an auditor, his subsequent return of it does not answer the requirements of the law and he became a trespasser *ab initio*.

It is true that an attaching creditor or officer who does not pay the amount due to a mortgagee of attached personal property, in accordance with the R. L. c. 167, § 69, loses his rights under the attachment. It is also true that an attachment may be made by trustee process under the R. L. c. 167, § 74, and that a method is provided for contesting the validity of the mortgage in the suit without a preliminary payment by the creditor or officer, and that this is sometimes a convenient mode of determining the rights of the parties. *Jackson* v. *Colcord*, 114 Mass. 60. *McDonald* v. *Faulkner*, 154 Mass. 34.

But the provision of § 70 of this chapter, that if the amount due is not paid or tendered within ten days after the mortgagee's demand the attachment shall be dissolved, relates to a title under a valid mortgage, and we have been referred to no case in which it is held that this result will follow if the mortgage is void, or is voidable by attaching creditors. To give such an effect to a fictitious or invalid mortgage would be likely to work so great injustice that nothing less than plain provisions to that effect would warrant us in sustaining the plaintiff's contentions. So far as we are aware, this section has always been construed by courts at *nisi prius* as it was construed at the trial of this case. In *Codman* v. *Freeman*, 3 Cush. 306, 311, Chief Justice Shaw, in speaking of a demand of this kind, said, "If the officer, after such notice, persisted in holding the goods, he did it at the peril, either of proving the mortgage invalid and void, or, as against the mortgagees, the plaintiffs, of being chargeable as a trespasser." We are of opinion that the defendant properly might contest the validity of the mortgage.

It is well settled that a title to real estate, acquired under a judgment and execution, cannot be established unless the execution is returned into court, but as the statute does not fix the time within which this must be done, the return will be effectual if it is made at any time before the execution is put in evidence in the case in which it is relied upon. *Prescott* v. *Pettee*, 3 Pick. 331. *Walsh* v. *Anderson*, 135 Mass. 65. *Firth* v. *Haskell*, 148 Mass. 501. It is equally true that an officer cannot justify an

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attachment of goods on mesne process unless he returns his writ into court. *Russ* v. *Butterfield*, 6 Cush. 242. *Williams* v. *Babbitt*, 14 Gray, 141. *Paine* v. *Farr*, 118 Mass. 74. *Wiggin* v. *Atkins*, 136 Mass. 292. We do not find that this court has ever decided the question whether an officer can justify a levy on an execution upon goods without a return of the execution. In *Tubbs* v. *Tukey*, 3 Cush. 438, 442, Mr. Justice Metcalf said, "It is well settled, that when an officer is sued as a trespasser, for levying a *fieri facias*, he need not show a return thereof, in order to justify the levy," and he cited English cases and 2 Greenl. Ev. § 597. The same doctrine is stated quite at length in *Clark* v. *Foxcroft*, 6 Greenl. 296, 299, in reference to executions similar to those used in this State. The opinion in *Pratt* v. *Pond*, 45 Conn. 386, states the law in the same way, and *Ingersoll* v. *Sawyer*, 2 Pick. 276, 279 contains dicta of Chief Justice Parker of like effect. On the other hand, it was held in *Munroe* v. *Merrill*, 6 Gray, 236, that an officer who arrests a debtor on execution and afterwards discharges him and returns the execution unsatisfied without stating the arrest in his return, cannot justify under the execution if sued by the debtor for the arrest. Although this case does not cover the question now raised, it contains reasoning, as do some of the other cases, which tends somewhat to support this part of the plaintiff's contention.

We do not find it necessary to decide the question, for if we should assume that the defendant could not justify without returning his execution, we are of opinion that for this purpose he could return it any time before it was received in evidence. There is no good reason why this part of the rule which applies to the return of executions levied upon real estate should not also apply to executions levied upon goods and chattels. The defendant in this case returned the execution a long time after the levy, but before the paper was put in evidence. This objection cannot avail the plaintiff.

Exceptions overruled.

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CLARENCE W. ROWLEY, assignee, *vs.* MICHAEL F. D ARCY.
MICHAEL F. D'ARCY *vs.* CLARENCE W. ROWLEY, assignee.

Suffolk. November 18, 1903. — January 6, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Insolvency. Auction. Evidence.

A sale by an assignee in insolvency of property of which the assignee has the title, openly offered for sale and sold to the highest bidder at a time and place duly appointed and announced, is a sale by auction, although some of the creditors of the insolvent retired from the room for consultation between their bids and a period of four hours elapsed between the times of putting up and selling the property.

Where a purchaser, at an auction sale by an assignee in insolvency, seeks to avoid his purchase on the ground that certain creditors fraudulently increased the price by fictitious bids, he cannot introduce evidence that the assignee before the sale proposed that he, controlling the auction sale, should sell the property to the purchaser at a nominal price, if the purchaser would make an additional payment for the benefit of the assignee and certain creditors.

A sale at auction by an assignee in insolvency of property of the insolvent estate is not voidable on the ground that the price was enhanced by means of fictitious bids agreed upon by certain creditors, if the alleged fraud was not known to the assignee, and, for aught that appears, each of the bids alleged to be fictitious might have been enforced against the bidder had it been the highest.

TWO ACTIONS OF CONTRACT, one by the assignee in insolvency of copartners constituting the firm of Berkman Brothers, to recover a balance alleged to be due from the defendant under a contract in writing, and the other by the defendant in the first named action to recover back the money theretofore paid under the contract. Writs respectively in the Superior Court dated December 10, 1898, and in the Municipal Court of the City of Boston, dated November 26, 1898, afterwards in the Superior Court by appeal.

In the Superior Court the cases were tried together before *Pierce*, J. The contract sued upon was as follows:

"Law offices of C. W. Rowley, 373 Washington Street, Boston, Mass. Nov. 23, 1898. I offer to C. W. Rowley, Assignee of Berkman Bros., $6500. Six thousand five hundred dollars, for the rights of the Berkman estate in the Willow Park 2d mort-

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gages of a face value of $14,500, assigned to me as collateral security for a loan of $11,500. And said Rowley, Assignee, accepts said offer. M. F. D'Arcy, Clarence W. Rowley, Assignee."

Rowley was the assignee appointed by the Court of Insolvency for the county of Suffolk of the firm of Berkman Brothers. At the time of Rowley's appointment D'Arcy held four second mortgages upon certain real estate situated in Willow Park in Boston, of a face value of $14,500, which had been assigned to him by the Berkmans within four months of the filing of the petition in insolvency. The assignee alleged that the mortgages were held as collateral security for a debt of the Berkmans to D'Arcy upon which there was a balance remaining unpaid of about $3,000, that these mortgages had been transferred by the Berkmans to D'Arcy in fraud of creditors, and that this transfer was also a preference and fraudulent as against the assignee. A bill in equity was pending, brought against D'Arcy after the insolvency, and before the appointment of the assignee, to restrain him from negotiating or foreclosing these mortgages and seeking to obtain them for the creditors. The assignee was appointed on October 7, 1898, and on November 23, 1898, sold to D'Arcy the rights of the estate in the second mortgages at the sale referred to in the opinion and held to be a sale by auction. D'Arcy paid $1,000 at the time of the sale, refused to pay the balance, and brought his action to recover back the $1,000. The assignee brought his action to recover the balance of the purchase price.

The judge ordered the jury to find for Rowley, the assignee, in the action in which he was plaintiff in the sum of $5,500 and interest, and also to find for him in the action in which he was defendant. D'Arcy alleged exceptions.

F. N. Nay, for D'Arcy.

G. R. Swasey & C. W. Rowley, for the assignee.

BRALEY, J. The principal question in these cases is whether the defendant D'Arcy can be held to pay any further sum under a written contract of sale made between the parties, or is entitled to recover back what he has already paid, on the ground that he bought the property at auction, at which unknown to him fictitious bids were made to raise the price, and in consequence of which he was deceived and defrauded.

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As a verdict was ordered for the assignee the evidence is to be considered in the light most favorable to this contention.

It was understood by the parties to these suits that there was to be a final sale of the rights of the debtors in the property described in the contract, to be held at the office of the assignee, and at the time appointed they and other creditors of the debtors attended. The property was offered for sale by the assignee and bids were called for, and made by different persons. It appears that in response to this call by the assignee some of the creditors would bid, then the bidding would cease for a time, and they would leave the room apparently for consultation between themselves; after which they returned and bidding would be resumed.

All the proceedings appear to have been conducted with great deliberation and a period of four hours elapsed between the time when the property was put up and when it was sold.

The conduct of the bidders and the manner of bidding does not seem to have aroused at the time any suspicion in the mind of D'Arcy that the sale was not being fairly conducted, and it is to be noted in this connection that during all this period his counsel was present to assist and advise him, so far as advice might be deemed necessary.

Finally the successful bid or offer was made by the buyer and accepted by the assignee in writing; and this was followed by, and formed the basis of, the contract in suit.

While some of the conditions that attended the sale are unusual yet the characteristic features of a sale by auction are found. At a time duly appointed, and announced, property to which the vendor had a good title is openly put up, and offered for sale, bids are made, and it is sold to the highest bidder. Such a sale must be considered and treated as having been made by auction.

It was clearly the purpose of the assignee and of the creditors present and who made bids, to realize for the property the highest obtainable price; and in good faith, by proper means, they might lawfully carry out this purpose in order to prevent a sacrifice of the estate of the insolvent debtors. *Phippen* v. *Stickney*, 3 Met. 384, 388, 389.

But a combination by them to enhance the price to be obtained by fictitious bids at a sale to be made without reserve to the

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highest bidder, would be a fraud practised upon those who bid without knowledge of the arrangement, and give to the buyer a right to avoid the sale. *Curtis* v. *Aspinwall*, 114 Mass. 187.

From the testimony of one of the witnesses it might be inferred that some of the bids made by the creditors and before the final bid of the defendant D'Arcy to whom the property was struck off, were of this character; and in his answer in the first case which must be taken to state the position taken by him at the trial, he relies upon this by-bidding to avoid the sale. But he does not aver that these puffers were employed by the assignee, or acting in his behalf, or that their conduct was known to him. He alleges that they were employed by the creditors of the estate in whose behalf the property was put up and offered for sale.

His offer of proof of evidence which was excluded * does not aid him; for if the evidence offered had been admissible under the pleadings and is taken most strongly against the assignee, while he might if the offer were true be found guilty of grave misconduct in his office, there is no statement from which it can be specifically inferred that by-bidders were to be employed by him, or with his knowledge or consent allowed to bid at the auction.

If the scheme outlined was to be put through, by-bidding would have been fatal to its success, as it was not desired to enhance the price of the property to be sold, but the purpose was to enable the defendant D'Arcy to get it as cheaply as possible, provided he made certain payments to the assignee.

As assignee, the plaintiff Rowley held by a good title the property of the debtors to be properly administered and applied in their behalf to the payment of their debts, and also repre-

* The offer of proof referred to was in substance, that at certain interviews Rowley stated to D'Arcy, that he could and would control the auction sale at which he proposed to sell the Willow Park rights, so that D'Arcy could buy them at a nominal price, provided Rowley should receive an additional sum from D'Arcy of $1,000, to go in part to himself, in part to one Danishevsky, in part to one Pinkoffski, and possibly to a few others of the creditors of Berkman Brothers; that at this time Rowley stated that the date had been set for the auction sale; and that this was the sale which subsequently was appointed for November 15 and adjourned to November 23, 1898, at which time the fraud complained of was alleged to have been perpetrated.

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sented the rights of the creditors that all the property of the debtors should be ascertained, turned into money, honestly accounted for, and paid over to them to the extent of the indebtedness proved, less the proper expenses of administration and distribution; and in all suits and proceedings in which the estate was involved it was his duty to appear, represent, and act for them.

Upon the assignment being made to him of the property of the insolvent debtors, he was vested with an absolute title to their estate which he could sell either by public auction, or at private sale so as to convey a good title to the purchaser. Pub. Sts. c. 157, §§ 46, 50. *Tuite* v. *Stevens*, 98 Mass. 305. *Crowley* v. *Hyde*, 116 Mass. 589.

The control of the sale was wholly in his power and under his direction, and no other person on the evidence could legally release any bidder from the obligation incurred by his bid. And the creditors who made the fictitious bids could not as between themselves provide immunity from any risk of being held personally liable for their several offers.

For anything that appears in the case each bidder could have been required by the assignee to take and pay for the property, if it had been struck off to him.

All of the evidence is recited in the exceptions and fails to show any misrepresentations by the assignee, or that he knew of and participated in the conduct and purpose of the creditors at any time before the final bid was made and accepted, and the written contract executed and delivered. The essential element of fraud which must be shown on the part of the vendor, or of the person who absolutely controls and directs a sale by auction in order to avoid it, is absent.

And as the assignee is not shown to have either procured or assented to the fictitious bids, the sale is not voidable on the part of the buyer, and must stand. *Peck* v. *List*, 23 W. Va. 338, 388. *National Bank of Metropolis* v. *Sprague*, 5 C. E. Green, 159, 165. *McMillan* v. *Harris*, 110 Ga. 72. *Towle* v. *Leavitt*, 23 N. H. 360. *Rigg* v. *Schweitzer*, 170 Penn. St. 549. *East* v. *Wood*, 62 Ala. 313. *Veazie* v. *Williams*, 8 How. 134.

Exceptions overruled.

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ANDREW MORTON *vs.* LLOYD B. CLARK & another.

Suffolk. November 18, 1903. — January 6, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Contract, What constitutes, Construction. *Words*, "Occasionally."

In an action for non-delivery of goods, under an oral contract of sale definite in all its terms except as to the time of payment, the fact that there was a subsequent misunderstanding and disagreement between the parties as to the terms of payment does not prevent the trial judge from finding what the parties ought to have understood the contract to be from the memorandum of the contract and their conversation, taken in connection with their previous dealings.

In an action for non-delivery of goods, under an oral contract of sale definite in all its terms except as to the time of payment, there was evidence that the payments were to be made upon drafts by the defendant on the plaintiff on sixty days' time, with occasionally one on ten days' time. The trial judge found this to be the fact, and that the term "occasionally" meant when the defendant was compelled to draw on short time by a reasonable regard for the exigencies of the business. *Held*, that the finding was justified, and that the explanation of the word "occasionally" was in accordance with its natural meaning when taken in connection with the facts and circumstances referred to when it was used by the parties.

CONTRACT, the amended declaration alleging a breach of an oral contract to sell and deliver to the plaintiff forty thousand sides of leather. Writ dated January 23, 1895.

The declaration before amendment was upon the memorandum as a contract in writing. After a finding for the plaintiff, the defendants' exceptions were sustained in a decision reported in 181 Mass. 134. After amendment of the declaration, and a demurrer and answer to the amended declaration by the defendants, there was a new trial in the Superior Court before *Gaskill*, J., without a jury. The judge found for the plaintiff and assessed damages in the sum of $6,612.57. He made the following memorandum of findings: "I find that the contract as to payment was on sixty day drafts except 'occasionally when the defendants were compelled to on ten days' drafts.' I find that it was not reasonable for the defendants to draw the last draft or any succeeding ones on ten days and that the defendants were not reasonably compelled so to do and had no justification for refusal to ship."

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The defendants alleged exceptions, raising the questions stated by the court.

G. W. Morse & J. H. Hickey, for the defendants.

R. M. Morse, for the plaintiff.

KNOWLTON, C. J. This is an action to recover damages for a breach of an oral contract for the sale of goods. The case came before this court after the first trial, and was reported in 181 Mass. 134. Most of the questions now before us were raised by the defendants' requests for rulings, and relate chiefly to the findings required by the evidence, which are essentially matters of fact. The defendants' demurrer to the amended declaration has not been argued, and we need not consider it.

The defendants contend that the judge should have found, either that no contract was made, or that, if a contract was made, it was upon a ten days' or cash basis. On this subject the evidence was somewhat conflicting. There is no doubt that a contract was made, all the terms of which were sufficiently clear and were not in dispute, except the provision as to the time of payment. There was evidence in the previous course of dealing between the parties, and in the testimony of Mortimer, the plaintiff's agent, and in the correspondence, which tended to show that the payments were to be made by the acceptance and payment of drafts drawn by the defendants upon the plaintiff on sixty days' time, with occasionally one on ten days' time. This was in accordance with the averments of the amended declaration. It was a part of the course of dealing that, when drafts were made on time, interest was added to the face of the bill up to the day when the draft was payable, so that the amount received from his banker by the vendor would be the same on a draft for a long time as upon a draft for a short time, the only difference to the parties between the two modes of payment being in the amount of capital or discounts or credit for which they would have to provide. The fact that there was a subsequent misunderstanding and disagreement between the parties in regard to the terms of payment does not prevent a finding of what they ought to have understood from their memorandum and conversation, taken in connection with their previous dealings.*

* See *Higgins* v. *Shepard*, 182 Mass. 364.

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There is no material variance between the findings of the judge and the amended declaration. He found that the contract as to payment was "on sixty day drafts except 'occasionally . . . on ten days' drafts.'" His finding by way of explanation of the term "occasionally", that it was "when the defendants were compelled to" draw on short time by a reasonable regard for the exigencies of the business, is simply giving the term its natural meaning when it is taken in connection with the facts and circumstances existing and referred to on the occasion when it was used by the parties. See *Black* v. *Bachelder*, 120 Mass. 171. After this finding as to the contract, the finding that there was a breach of it necessarily followed.

It is not necessary to consider other questions raised at the trial.

Exceptions overruled.

EDWARD S. BRADFORD *vs.* CITY OF WORCESTER.

Suffolk. November 19, 1903. — January 6, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Pauper, Settlement.

Clause 7 of Pub. Sts. c. 83, § 1, providing that married women "who have not a settlement derived by marriage" may gain a settlement by residing in any place within this State for five years, refers to a marriage then existing, and does not exclude a woman who being the widow of a man with a settlement in this Commonwealth married a man without such a settlement and lived in a city of this Commonwealth for five consecutive years.

Under clause 7 of Pub. Sts. c. 83, § 1, a married woman whose husband has no settlement in this Commonwealth can gain a settlement by residing in a city of this Commonwealth for five consecutive years, although during the whole of that period her husband has been absent from the Commonwealth wandering from State to State.

CONTRACT, by the treasurer of the Commonwealth against the city of Worcester, for the support of a pauper at the Worcester Insane Hospital. Writ dated January 16, 1903.

In the Superior Court the case was presented upon an agreed statement of facts. That court gave judgment for the plaintiff; and the defendant appealed.

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The agreed facts were as follows: The pauper, Charles Williams, was born in Worcester, on March 26, 1876. He was committed to the Worcester Insane Hospital on March 2, 1898, and was discharged therefrom on May 12, 1899. His parents were Henry A. Williams and Mary A. (Jackson) Williams. His father, Henry A. Williams, abandoned his wife and children in August, 1875. He never was in Worcester after that, and never at any time had a settlement within the Commonwealth. After that date he did not live with his wife, and did nothing for her support. He resided in Connecticut, and resided for five years in Washington. In 1887 he came to Amherst for a short visit, since which time his whereabouts were unknown. After Henry A. Williams abandoned his wife and children in 1875, his wife, the mother of the pauper, resided in Worcester continuously, without receiving relief as a pauper, with a single exception in November, 1886, when one of her children by her first husband, Arthur Jackson, was aided by the town of Shutesbury. Mary A. Williams, mother of the pauper, had a derivative settlement at birth in Northampton, Massachusetts. She married Arthur Jackson at Northampton, in 1869, and through this marriage acquired a settlement in Shutesbury. Jackson died in 1870, and in 1871 she married Henry A. Williams, father of the pauper.

If, upon the above facts, the pauper acquired a derivative settlement in Worcester through his mother, judgment was to be entered for the plaintiff for the amount named in the declaration. If he did not acquire a settlement thus, judgment was to be entered for the defendant.

A. P. Rugg, for the defendant.

A. Lord, for the plaintiff.

BRALEY, J. If Mary A. Williams, the mother of Charles Williams, acquired a settlement in Worcester he gained a derivative settlement through her in the defendant city, which would become liable for his support as a pauper, and this presents the question to be determined.

At the time of her marriage in 1871 to Henry A. Williams, the father of Charles Williams, she was a widow and her last legal settlement, derived from a former husband, was in the town of Shutesbury.

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The first contention of the defendant is that she does not fall within the description of a married woman who has not a settlement derived by marriage under Pub. Sts. c. 83, § 1, cls. 1, 6 and 7, because her former settlement in Shutesbury is to be deemed a "settlement derived by marriage" within the meaning of the first clause, which was a re-enactment of Gen. Sts. c. 69, § 1, cl. 1, and in force at the time of her second marriage.

But these clauses are to be construed together, and clause 6 of Pub. Sts. c. 83, § 1, at the time of its original enactment in St. 1874, c. 274, § 2, was held to apply only to unmarried women. *Somerville* v. *Boston*, 120 Mass. 574. And it is said in the reasons given that "the rule that the settlement of a married woman follows that of her husband has long been the statute rule of this Commonwealth. Sts. 1789, c. 14; 1793, c. 34, § 2. It rests upon the principles of the common law, . . . it concerns the unity of the marriage relation . . . because the law will not permit the separation of husband and wife." Subsequently to this decision, St. 1879, c. 242, § 2, was passed and forms clause 7 of Pub. Sts. c. 83, § 1, the object of which was to change the law so far as it affected married women, and give them the same rights in the acquisition of a settlement as unmarried women. *Marden* v. *Boston*, 155 Mass. 359, 361.

It appears from the agreed facts that Henry A. Williams never at any time had a settlement within the Commonwealth, and there was no "settlement of her husband" which she could follow as her domicil for the purpose of relief as a pauper, and that would defeat a settlement derived from her first husband.

The purpose of the first clause was to recognize the merger of the wife by the marriage relation, and the right of the husband to fix their domicil; and if he failed to maintain it for a sufficient time to acquire a settlement which by force of law should also be that of his wife, then she should not lose her own by reason of her marriage.

The words of the seventh clause "derived by marriage" are to be read with the words "at the time of marriage" found in the first clause and to which they refer, and are to be taken in their plain sense and meaning. They relate to and mean a marriage then existing and not a former marriage which has

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been dissolved by the death of the husband and no longer legally exists, the status of the wife being changed from that of a married woman to that of a widow, for whom as such provision is specially made. In other words a present marital relation is the foundation on which the right rests, and when that relation ceases the protection of the statute is extended to her as a widow. The language used in the seventh clause "married women who have not a settlement derived by marriage," in order to give her any right to relief as a pauper must therefore be held to mean a settlement derived from a living husband, whose settlement, if he had any, either at the time of marriage or subsequently acquired during coverture, becomes by statute that of his wife.

Their marriage took place in 1871, and in August, 1875, the husband and father abandoned his wife and children, and since that time he has done nothing for her or for their support. He has wandered from State to State outside the Commonwealth, being sometimes in one and sometimes in another, and in all his wanderings, covering a period of twelve years up to 1887, he is not shown to have become a citizen or made a home in any one place; and since that time "his whereabouts have been unknown." His wife continued in the home where he left her, apparently supporting her children so far as she was able, and never received any relief as a pauper except once in November, 1886.

And it is admitted that Mary A. Williams has resided in Worcester for at least five consecutive years since the passage of St. 1879, c. 242, during which time she has not received relief as a pauper, and nothing is disclosed to take the case out of the general rule that ordinarily residence is to be considered the same as domicil. *Phillips* v. *Boston*, 183 Mass. 314.

Under these conditions the defendant finally relies on the fiction of the common law that husband and wife are legally one person and wherever he may be at any time, as a matter of domiciliary law his wife is there also; and though during all this period he was physically absent from the city of Worcester, his wife even if bodily therein, must as a matter of law be held to have been with him, and as he did not live there "for five years together" she did not. *Stoughton* v. *Cambridge*, 165 Mass. 251.

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No argument is necessary to make it clear that under such circumstances to deny a separate legal existence to the wife is to take a position that does not in truth reflect her domestic situation, and the Legislature well might provide for this class of cases which are by no means uncommon.

In order to provide for those who may be in need of such charitable aid as it has been the policy of the State to require cities and towns to furnish at the public expense, it is within its power at any time to change the law relating to the settlement of paupers and make such regulations under which relief is to be given as it may deem just and expedient. And it may make either citizenship or residence or both the test. Former settlements may be saved or declared defeated and lost, and the terms under which relief is to be extended to paupers may be thereby radically changed and made more onerous. *Goshen* v. *Richmond*, 4 Allen, 458. *Bridgewater* v. *Plymouth*, 97 Mass. 382, 390. *Endicott* v. *Hopkinton*, 125 Mass. 521, 522. *Worcester* v. *Springfield*, 127 Mass. 540. *Fitchburg* v. *Ashby*, 132 Mass. 495. *Dedham* v. *Milton*, 136 Mass. 424. *Worcester* v. *Great Barrington*, 140 Mass. 243, 244.

From time to time, by acts of the Legislature, a married woman in this State has been freed from many of the limitations of the common law relating to her person and property. And the rights of the husband, as they existed before the enactment of these statutes, have been greatly abridged and survive to a very limited extent. He may still be considered as the head of the family, with the right to select and fix the home, and under the criminal law is commonly to be treated as responsible for its proper management. *Commonwealth* v. *Hill*, 145 Mass. 305. *Commonwealth* v. *Walsh*, 165 Mass. 62, 65. *Harmon* v. *Old Colony Railroad*, 165 Mass. 100, 105.

The harsh injustice that may sometimes be the result of the rule that husband and wife are a legal entity has been recognized in divorce proceedings instituted by the wife, and for that purpose as well as for that of separate support and maintenance she is held to have a separate domicil. *Burtis* v. *Burtis*, 161 Mass. 508. Pub. Sts. c. 147, §§ 31–34. *Osgood* v. *Osgood*, 153 Mass. 38, 39.

Under the facts disclosed, Mary A. Williams could have in-

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stituted and maintained either a suit for separate support and maintenance or for a divorce from the bonds of matrimony; and there would seem to be no sufficient reason why under our laws relating to the settlement of paupers, a married woman who has been abandoned by her husband might not have a domicil separate and distinct from his in all cases where he has no settlement in this State.

We are of opinion on the facts disclosed by this case that Mary A. Williams was obliged to follow and claim the settlement of her husband, if he had any within the State, even if she thereby lost her former settlement; but if he had none, she, by residing "in any one place within this State for five years together," gained a settlement of her own for the purpose of pauper relief. *Cambridge* v. *Boston*, 130 Mass. 357. *Marden* v. *Boston*, *ubi supra*. *Williamsburg* v. *Adams*, *ante*, 263. It follows that Mary A. Williams had a legal settlement in Worcester; and Charles Williams, her son, never having acquired a settlement of his own in this State, his settlement followed that of his mother. Pub. Sts. c. 83, § 1, cl. 2.

Judgment affirmed.

EDWIN STOWELL & another *vs.* THEODORE C. GRAM & another.

Suffolk. November 19, 1903. — January 6, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Contract, Novation. *Assignment.*

In an action against the assignee of a contract in writing, for a failure to make and deliver certain articles in accordance with the contract, the plaintiff, to recover, must show that he released the assignor from his obligation under the contract and accepted the defendant in his place, and that the defendant agreed with the plaintiff to perform the contract as his own.

CONTRACT, for alleged breach of a contract in writing between one Holt doing business under the name of the Holt Novelty Company and the plaintiffs, to make and deliver five hundred field of view dividers, a divider being an appliance to be placed

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on a camera, against Theodore C. Gram and Henry Pletsch, assignees of the contract, alleged to have assumed its obligations. Writ dated September 11, 1896.

At the trial in the Superior Court before *Gaskill*, J., the judge ordered a verdict for the defendants, and, by agreement of the parties, reported the case for determination by this court. If the ruling was correct, judgment was to be entered for the defendants. If on the evidence the jury would have been warranted in returning a verdict for the plaintiffs, judgment was to be entered for the plaintiffs in such a sum as this court should determine, subject to certain stipulations which the decision of the court has made immaterial.

J. E. Hannigan, for the plaintiffs.

G. W. Anderson, for the defendants.

KNOWLTON, C. J. In the present case the presiding judge directed a verdict for the defendants, and reported to this court the question of law whether there was any evidence that would warrant a verdict for the plaintiffs. The plaintiffs made a contract for the manufacture of certain articles with one Holt, who became financially embarrassed after he had begun the work, and then arranged with these defendants that they should take a bill of sale of certain property and an assignment of this contract, and assist him in his embarrassment. The question is whether there was evidence which would warrant a finding that the contract between the plaintiffs and Holt was given up, and that a new contract of the same kind, covering the unfinished work, was made between the plaintiffs and the defendants.

The defendants cannot be held liable upon a promise to see that Holt's contract was performed, for such a promise would be within the statute of frauds. To establish a novation on which the plaintiffs can charge these defendants, it must be proved that the plaintiffs released Holt from his obligations under the contract and agreed to look to the defendants alone, and that as a part of the same arrangement Holt released the plaintiffs from their liability to him, and that the defendants agreed with the plaintiffs to perform the contract as their own.

The writing under which the defendants acquired their rights from Holt was a bill of sale of the tools, fixtures, machinery and office furniture used in his business, and the furniture and the

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furnishings of every kind in a certain dwelling house. The writing also included an assignment of this contract with the plaintiffs. The dwelling house was referred to in the testimony as a lodging house which cost Holt $1,200. Holt testified that the bill of sale was given as security to the defendants for money which they were to lend him and furnish for his assistance. This testimony was uncontradicted, and was confirmed by other facts in the case. The conduct of the parties and the entire evidence were inconsistent with any other theory than that the title of the defendants under the writing was held only as security.

There was no testimony that Holt ever agreed with the defendants or the plaintiffs to give up, except as security for his debt to the defendants, the benefits by way of profits or otherwise to which he might be entitled from the performance of his contract, and the dealings of all the parties tend to show that the contract with Holt was treated as subsisting while the defendants were engaged with him in the performance of it. When the plaintiffs made their first payment after the defendants took possession under their bill of sale, they took a receipt signed by Holt in the name of the Holt Novelty Company, the name under which he did business, and in the receipt the money was said to be "in payment of account with Holt Novelty Company." The next payment made by the plaintiffs was upon an order signed by Holt, requesting payment to the defendants of all money due him on the contract, and reciting that he had made to them an assignment of the contract. A receipt subsequently signed by the defendants, recited that the money was received "on account of contract . . . made with Holt Novelty Co." Without reviewing the evidence further, we are of opinion that there was nothing before the jury which would have warranted them in finding that the contract with Holt was given up by agreement of all parties, and that a new contract was made between the plaintiffs and the defendants.

Judgment for the defendants.

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JOHN H. LOUGHLIN *vs.* JOHN PARKINSON & others.

Suffolk. November 19, 1903. — January 6, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Wagering Contracts.

St. 1890, c. 437, § 2, giving the right to recover money paid on wagering contracts, was amended and not repealed by St. 1901, c. 459, and so far as it was unchanged by the later act remained in force as to transactions which occurred before the amendment.

CONTRACT, for money alleged in the amended declaration to have been paid on wagering contracts on certain dates in the years 1898 and 1899. Writ dated November 5, 1902.

The defendants demurred, alleging, among other causes of demurrer, that the provisions of St. 1890, c. 437, § 2, were repealed by St. 1901, c. 459.

In the Superior Court *Richardson*, J. sustained the demurrer and gave judgment for the defendants. The plaintiff appealed.

F. F. Sullivan, (*J. M. Sullivan* with him,) for the plaintiff.

H. E. Warner, for the defendants.

KNOWLTON, C. J. This action comes before us on a demurrer to the plaintiff's amended declaration. The several counts set forth causes of action under the St. 1890, c. 437, and under the amendatory St. 1901, c. 459, for the recovery of money paid on stocks contracted to be bought upon margin. They follow substantially the language of the later statute, although they all describe transactions which occurred before the amendatory act was passed. We do not understand from the argument that the counts are deemed by the defendant insufficient in form, if the St. 1890, c. 437, is still in force in reference to transactions which occurred prior to the enactment of the St. 1901, c. 459, and which come within the description of the amendatory act. We are of opinion, for reasons stated in *Wilson* v. *Head*, *ante*, 515, that all the cases in which there may be a recovery under the later statute are included in the earlier statute, and that as to such cases, the earlier statute has never been changed, but remains in force. The language in which the averments are

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made, although it takes the form found in the later statute, states a case in every count which is also within that part of the earlier statute which remains unchanged, and the entry must therefore be,

Demurrer overruled.

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187 504

BOSTON ELECTRIC LIGHT COMPANY *vs.* BOSTON TERMINAL COMPANY.

Suffolk. November 20, 1903. — January 6, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Electric Light Company. Constitutional Law.

An electric light company, using the streets of Boston for the support of its poles and wires under a license revocable by the public authorities, and required by St. 1894, c. 454, to put its wires underground under a like revocable license, holds such privileges in the streets subject to revocation by the Legislature.

St. 1896, c. 516, providing for a south terminal station in Boston, does not violate the obligation of contracts in authorizing the taking of portions of certain streets containing conduits of the Boston Electric Light Company, incorporated under the general laws contained in Pub. Sts. c. 106.

TORT for taking conduits, wires and cables of the plaintiff under St. 1896, c. 516, alleged to be unconstitutional. Writ dated October 18, 1901.

In the Superior Court the case was tried before *Mason*, C. J., without a jury. He found for the defendant; and the plaintiff alleged exceptions.

E. W. Burdett & C. A. Snow, for the plaintiff.

S. Hoar & W. Hudson, for the defendant.

KNOWLTON, C. J. This is an action of tort to recover the value of conduits laid by the plaintiff in portions of two public streets in Boston, which were discontinued by St. 1896, c. 516, and taken by the defendant for a part of the site of the terminal station erected under the authority of this statute. The plaintiff brought a petition for damages for the taking of these conduits, which was before this court, and is reported in 182 Mass. 397. In that case it was decided that no part of the petitioner's property was taken, and after a consideration of the uses to

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which public streets may be put in this Commonwealth, and the rights of parties using them, under our general laws, the opinion proceeds as follows: "All the statutes and ordinances upon which the petitioners rely as a justification for their action in constructing conduits in the public streets and as giving them rights of property there, are merely provisions for the regulation of the different public rights in the streets. None of them purports to convey private rights of property. Most of them expressly state the limitations upon the authority given, and make the petitioners subject to possible future proceedings terminating or modifying their rights." The statutes and ordinances relied on were then cited. The plaintiff now attacks the constitutionality of the St. 1896, c. 516, and seeks to bring this action within that class of cases in which a statute has been held to confer upon a corporation a franchise, which includes a private right of property in streets and public places, that is protected by the constitution of the United States under the contract created by action of the corporation under the statute.

In view of the plaintiff's contention, it may be well to consider more particularly the authority under which these conduits were laid. The plaintiff was incorporated under the general laws contained in the Pub. Sts. c. 106, for the purpose of conducting the business of manufacturing, generating, transmitting and supplying electricity to be used in lighting in the city of Boston. This statute authorizes the organization of corporations for carrying on business of many different kinds, but it contains no special mention of business of this kind, and does not purport to give any authority to use the public streets. Most of the poles formerly used by the plaintiff on the streets referred to were erected by its predecessors in title, those in Kneeland Street by the Brush Electric Lighting Company, and those in Federal Street by the American Union Telegraph Company, which corporations, as we infer from the bill of exceptions, were organized under the same statute as the plaintiff. In reference to the erection of poles by each of these corporations, the mayor and aldermen of Boston passed an order giving permission to erect the poles in the streets upon numerous stated conditions, one of which was that the company "shall remove

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said poles when so directed by said board" (of aldermen). Another was as follows: "Also on condition that if any of the above conditions are not complied with, the board of aldermen may remove said poles at the expense of said company." Ordinances were passed from time to time in regard to regulation and control of rights in the public streets, none of which purported to give to the plaintiff or to any similar company any rights which were not subject to control or termination at any time by the board of aldermen or the city council. The Revised Ordinance of 1885, c. 28, as amended by the ordinance of March 24, 1886, contains provisions as follows: "Telegraph, telephone, and electric light companies, whether chartered by this or any other State, may lay wires under the streets of the city, under the following regulations, and not otherwise. . . . Second, that said company shall remove its conduits whenever directed so to do by the city council." It is, therefore, too plain for discussion that at the time of the passage of St. 1894, c. 454, the plaintiff was using the streets of Boston for the support of its poles and wires under a license revocable at any time by the public authorities.

This statute provided for a gradual removal, under the direction of an officer called a commissioner of wires, of all the wires and electrical appliances, with certain exceptions, in the public streets of a specified portion of the city of Boston which included Federal Street and Kneeland Street. It applied to all owners or users of wires, cables and conductors within this specified portion, and included in terms every "person, firm or corporation operating or intending to operate wires, cables or conductors in said section of said city." It gave to those then operating such wires the option to remove them without placing them elsewhere, or to put them underground in conduits to be constructed under regulations. It was made the duty of the superintendent of streets "to issue, subject to the usual conditions, all permits for opening and occupying the streets of said city, necessary to carry out the intent of this act, upon application of said commissioner." The usual conditions of permits were prescribed by the ordinances then in force. Ordinances bearing upon this subject are the Revised Ordinances of 1892, c. 8, § 21; c. 36, §§ 8, 14, 16, and the ordinance of 1885, c. 28,

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as amended by the ordinance of March 24, 1886. The Revised Regulations of the board of aldermen of 1892, c. 5, § 1, leave the issuing of permits subject to existing ordinances, as to terms, specifications and conditions, and do not change the conditions affecting this case. Section 14 of c. 36 of the ordinances of 1892 deals particularly with permits to open and occupy portions of the streets for the purpose of laying, maintaining and using "wires, pipes, or conduits under the surface thereof," and prescribes as one of the conditions that the person applying for the permit "shall remove the conduits and wires whenever directed . . . so to do by the city council." Other ordinances then existing also provided that such conduits might be laid only upon condition that they should be removed at any time when directed by the city council.

The petitioner laid its conduits under a permit containing this condition. It now contends that it acquired a right of property in the street, such that the street could not be discontinued and appropriated to another public use without giving it compensation.

Under the charter of the city of Boston, the control and management of the rights of the public in the streets and highways were vested in the mayor and aldermen and the city council. It has been the policy of these bodies to retain this control, and not to permit the acquisition of private rights in the public easement by individuals or corporations. Under our system of laws, the fee remains in the original owner or his successors in title, and the land may be used by him in any way that is not inconsistent with the rights of the public under the easement acquired by them when the street was laid out. Upon a discontinuance, the easement is terminated and the entire estate reverts to the owner of the fee. It seems pretty plain that by the St. 1894, c. 454, the Legislature did not intend to create private rights which should interfere with the power of the public authorities at any time to discontinue a street, or with the right of the owner of the fee, on the termination of the easement, to have his property unincumbered by any subsequently created interest. It cannot be supposed that every "person, firm or corporation" who elected to put wires underground rather than to remove them, was given a franchise which

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included an individual right of property in the public easement that previously had been taken from the landowner. Rather the meaning of the statute seems to be, that persons, firms and corporations who were then using streets for the maintenance of poles or wires under a revocable license, should remove them, and should be permitted, if they chose, to put them underground under a like revocable license. For years the ordinances had allowed conduits to be put underground only by virtue of such a revocable license, and the St. 1894, c. 454, only authorized this under permits containing the usual conditions.

This construction of the statute is in accordance with the general policy of our law in regard to this easement of the public. The locations of our street railways in public streets are subject to revocation. R. L. c. 112, § 32. The construction of gas mains in a highway or street gives no right excepting a right to use the highway or street while it is a highway or street, and does not prevent the public authorities from altering or discontinuing it without a liability in damages. R. L. c. 121, § 17. *Natick Gas Light Co.* v. *Natick*, 175 Mass. 246, 252. Under the statute just cited the erection and maintenance of gas pipes or poles and wires for lighting by electricity are subject to the direction and control of the mayor and aldermen, or the selectmen. Though private corporations have sometimes been granted franchises by special acts of the Legislature, which give them permanent rights of property in public streets, the provisions of these laws are not applicable to the plaintiff in this action.

The contention that the right of revocation reserved by the ordinances and the permit to the city council cannot be exercised by the Legislature is without foundation. The Legislature is the supreme authority in regard to public rights in the streets and highways. This reservation of a right of revocation was a limitation of the plaintiff's right to continue its peculiar use of the street as one of the public by the maintenance of a conduit, and it was a part of the regulation of the rights of all the public. The reservation to the city council was to that body as a representative of the public, and not to it in a narrow or individual sense. The Legislature could at any time supersede the city council in the exercise of its powers, and could do any-

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thing that ought to be done in regard to this public easement. The important fact is that the plaintiff had been given no right which was not subject to the control of this easement by the proper authorities. See *Richmond* v. *Southern Bell Telephone & Telegraph Co.* 85 Fed. Rep. 19; *Southern Bell Telephone & Telegraph Co.* v. *Richmond*, 103 Fed. Rep. 31, 34.

The cases cited by the plaintiff in regard to legislative franchises which include rights of property in public places are not applicable to this case.

Exceptions overruled.

MARIA L. S. GARGANO *vs.* FRANK J. POPE & others.

Suffolk. December 7, 1903. — January 6, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Contract, Validity. *Champerty. Attorney. Equity Jurisdiction.*

A contract by an attorney at law to prosecute an action for two thirds of the proceeds, with no indication that there is to be any compensation in case of failure, and where in case of success a debt for services is not in the contemplation of the parties, is void for champerty.

The fact that a plaintiff in equity could have set up the facts on which he relies as an equitable defence to an action at law does not deprive this court of jurisdiction in equity.

This court has jurisdiction in equity to set aside a contract void for champerty.

A client who has made with his attorney a contract in writing void for champerty is not barred as one *in pari delicto* from maintaining a suit in equity to set aside the contract.

The rule that one must come into equity with clean hands does not apply to a client bringing a suit in equity against his attorney to set aside as void for champerty a contract in writing to which the plaintiff is a party.

BILL IN EQUITY, filed June 28, 1902, to enforce the payment of $550 due to the plaintiff from the defendants Pope and Davis, and to set aside a contract between the plaintiff and the defendants Dowd and Tebbetts whereunder they claimed two thirds of the amount so due.

The contract in question was as follows:

"Agreement between Maria L. S. Gargano, of New York City, widow of Carmine Gargano, who was accidentally killed July 3, 1900, at East Boston, Mass., party of the first part, and George

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W. Tebbetts and Frederick C. Dowd, attorneys at law, both of Boston, county of Suffolk and Commonwealth of Massachusetts, party of the second part, witnesseth:

"That, whereas, said party of the first part desires to prosecute an action at law to recover damages against the Equity Associates, so-called, of East Boston, for the death of her said husband.

"And whereas, the party of the first part has requested the parties of the second part to take such legal proceedings as may be necessary to recover such damages.

"Now, in consideration of the services rendered and to be rendered in the premises by the parties of the second part for and on behalf of the said party of the first part,

"It is agreed that said parties of the second part shall have authority irrevocable to act for the party of the first part, and to sue for, collect, release, discharge all claims due or alleged to be due to the party of the first part on account of the death of her said husband, and to adjust, compromise, settle and dispose of said claim, or damages awarded in whole or in part, precisely as the party of the first part might be bound by her own act under seal or otherwise, and further.

"It is agreed, that out of the moneys received before or after said settlement or compromise, the parties of the second part shall be entitled to retain for themselves, as compensation for their services, a sum of money equal to sixty-six and two-thirds per cent of the moneys so received, rendering the balance of one-third to the party of the first part, who hereby covenants and agrees to receive and accept such proportion from the parties of the second part, in full and complete settlement and acquittance of any claim growing out of this contract.

"And it is further agreed that said parties of the second part shall have an express lien on any judgment or settlement of the suit of said party of the first part against said Equity Associates, for all services rendered by the parties of the second part under this agreement.

"The said party of the first part hereby covenants and agrees to execute all papers, releases, or other writings deemed necessary by said parties of the second part in furtherance of this contract.

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"In testimony whereof, we hereunto set our hands and seals this third day of July, A. D. one thousand nine hundred and one. Maria L. S. Gargano. [Seal.] George W. Tebbetts. [Seal.] Frederick C. Dowd. [Seal.]

"Witness to all, having first faithfully interpreted the foregoing, reading the same in the Italian language to Maria L. S. Gargano: Michele Nigro."

The case was referred to J. A. Lowell, Esquire, as master. He found that the contract was void for champerty, that the defendants Pope and Davis should be ordered to pay the plaintiff $550, and that the contract should be declared to be void and ordered to be delivered up for cancellation.

The Superior Court made a decree for the plaintiff in accordance with the master's report; and the defendants Dowd and Tebbetts appealed.

The answer of the defendants Dowd and Tebbetts referred to in the opinion contained, among other matters in the nature of a demurrer, the allegations that the plaintiff had an adequate remedy at law, that no facts were alleged to show that the plaintiff was without a remedy at law, and that the bill set forth no grounds for equitable relief.

S. H. Tyng, for the defendants Dowd and Tebbetts.

A. D. Hill, (*L. E. Wyman* with him,) for the plaintiff.

LORING, J. The only exception to the master's report taken by the defendants Tebbetts and Dowd is that he erred in his finding of law that the agreement in question was void for champerty.

The master's finding is as follows: "Findings of Law. . . . I find that the said agreement is void for champerty. It is a contract by the defendants to prosecute a suit at law for a percentage of the proceeds. There is no indication that there was to be any compensation in case of failure, and in case of success a debt for services was not in the contemplation of the parties. The provision as to lien was inserted to give the defendants a more secure hold on the proceeds."

The parties reduced their agreement to writing, and we agree with the master in the construction to be given to that agreement. The cases are reviewed in *Hadlock* v. *Brooks*, 178 Mass. 425, and nothing need be added here.

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Apart from the objection that the defendants waived their demurrer (if the part of the answer relied on be taken to be a demurrer) by going to a hearing on the merits, there is nothing in the objection that the facts relied on as entitling the plaintiff to relief could have been set up as an equitable defence. That does not bar the plaintiff from obtaining relief in a court of equity if the court has jurisdiction. *Cook* v. *Richardson*, 178 Mass. 125.

There is a jurisdiction in equity to relieve against a void contract made by a solicitor on the ground of constructive fraud, of which equity has jurisdiction. For an instance of the exercise of a similar jurisdiction see *Reynell* v. *Sprye*, 1 De G., M. & G. 660. See also *O'Brien* v. *Lewis*, 32 L. J. Ch. (N. S.) 569.

Since St. 1877, c. 178, now R. L. c. 159, § 1, this court has full equity jurisdiction. The cases are collected in *Niles* v. *Graham*, 181 Mass. 41.

The allegation in the bill admitted by the answer "that at the time of the execution of said agreement . . . [these defendants] . . . were acting as attorneys for the plaintiff in the matter of her said claim against the [other] defendants" does not prevent this conclusion. The agreement covers the "services rendered and to be rendered."

The plaintiff is not barred of her remedy as one *in pari delicto*, or who has not come into equity with clean hands. The money has not been paid to the attorneys and therefore it is not necessary to go so far as the court went in *Reynell* v. *Sprye*, 1 De G., M. & G. 660; *Cox* v. *Donnelly*, 34 Ark. 762; *Hale* v. *Sharp*, 4 Cold. 275.

Decree affirmed.

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GEORGE M. McCOY & another, executors, *vs.* L. STEWART JORDAN.

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Norfolk. December 7, 1903. — January 6, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Will. Evidence. Practice, Civil. Rules of Court.

On the issue of the sanity of a testator, the contestant of the will contended that the testator was of unsound mind by reason of senile dementia, a progressive disease which continued to the time of his death. The will was executed in April, 1895. The testator died in September, 1898. The judge of the Superior Court, before whom the issues of fact were tried, fixed January 1, 1897, as the time up to which witnesses might testify in regard to the testator's appearance, conduct and apparent condition. No objection to this was made by either party. The contestant asked the attending physician of what disease the testator died. The judge excluded the question. *Held*, that the exclusion was right, and that it was not the duty of the judge to receive the evidence merely because an expert would testify that in his opinion it had some significance.

On the issue of the soundness of mind of a testator, a witness not an expert cannot be asked the question "From these facts what did you infer in your own mind as to Mr. J's [the testator's] mental capacity?"

On the issue of the soundness of mind of a testator a witness not an expert can be asked whether he noticed any failure of memory and whether he ever noticed anything to indicate that the testator was not of sound mind. Such a witness also may be asked whether he noticed any failure of intelligence on the part of the testator and whether the testator's memory was good or bad, if the questions are limited by the judge to observations of external manifestations and are so answered.

On the issue of the soundness of mind of a testator, a witness not an expert cannot be allowed to testify that the testator's "powers seemed to be complete and perfect" nor that so far as the witness remembered each time he saw the testator he "should say that he was in the possession of clear faculties and mental powers."

Rule 48 of the Superior Court, that "when further instructions are given in the absence of counsel after the jury have retired, the presiding justice may permit exceptions thereto at any time within twenty-four hours next following", is reasonable, and is binding on the parties to an action. Where instructions are so given on a legal holiday which falls on a Friday and the court does not convene again until the following Monday an exception to these instructions taken on the last named day cannot be allowed.

Under R. L. c. 166, § 5, c. 158, § 4, a presiding judge may give further instructions to a jury on a legal holiday.

Where the circumstances attending the return of a verdict were such as to raise a doubt whether it was unanimous, but the jurors by their foreman had signed the verdict and it was affirmed, all the jurors assenting to it although one of them said that he did so under protest, there was held to be no error of law on the part of the presiding judge in refusing to treat the verdict as illegally received and recorded.

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APPEAL from a decree of the Probate Court for the County of Suffolk allowing the will of William H. S. Jordan.

The case was sent to the Superior Court for trial of the following issues: "1. Was the instrument offered for probate by the said executors, dated April 11, 1895, duly executed as and for the will of the said W. H. S. Jordan? 2. Was the said W. H. S. Jordan of sound and disposing mind and memory at the time of the execution of said instrument? 3. Was the said instrument purporting to be the last will and testament of the said W. H. S. Jordan procured by the fraud or undue influence of George M. McCoy?"

At the trial of the issues before *Sherman*, J., the jury found for the executors on all the issues in the manner stated in the opinion. The contestant alleged exceptions. In allowing the first bill of exceptions the judge made the following statement: "I allow the exception taken by the appellant on Monday forenoon, June 2d, after the verdict, if in the exercise of my discretion under the circumstances described, I am empowered to do so by Rule 48 of the Superior Court. With this reservation the foregoing bill of exceptions is allowed."

There also was a supplemental bill of exceptions. The questions raised by both bills of exceptions appear in the opinion.

G. L. Huntress & S. L. Whipple, for the contestant.

R. M. Morse, for the executors.

KNOWLTON, C. J. The first question to be considered upon these bills of exceptions is whether there was error of law in the admission or exclusion of evidence.

At the time of his death in September, 1898, the testator was about eighty-four years of age. The will in question was executed in April, 1895. It was contended by the appellant that he was not then of sound mind, but was afflicted with senile dementia, a progressive disease, which continued to the time of his death. Without objection by either party, the court fixed January 1, 1897, as the time up to which witnesses might testify of their observation of him in regard to his appearance and conduct and apparent condition. The determination of the question how far subsequently a party may go for testimony to show a person's mental condition at a given time, must be left very largely to the discretion of the presiding judge, and there is

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nothing to indicate that this discretion was not wisely exercised in the present case. *Shailer* v. *Bumstead*, 99 Mass. 112, 130. *Commonwealth* v. *Pomeroy*, 117 Mass. 143, 148. *Lane* v. *Moore*, 151 Mass. 87, 90. The appellant asked the attending physician to testify of what disease the testator died. The question was excluded and the appellant excepted. This question related to the condition of the testator more than a year and a half after the date by which the testimony of other witnesses as to his condition was limited, and nearly three years and a half after the execution of the will. The admissibility of the evidence was urged at the trial on the ground that it would be a foundation for expert testimony tending to show, from his condition at the time of his death, that this progressive disease was upon him and made him of unsound mind at the time of the execution of the will. We are of opinion that the testimony was rightly excluded. It was not the duty of the judge to receive it merely because an expert would testify that in his opinion it had some significance.

The other questions of evidence involve a consideration of the rule as to testimony of witnesses not experts in regard to the mental condition of a testator. The rule in this Commonwealth differs from that in some places, but it has long been well established, and this court has repeatedly refused to change it. Such witnesses are not permitted to give their opinion in regard to the mental condition of one whose sanity is called in question. *May* v. *Bradlee*, 127 Mass. 414. *McConnell* v. *Wildes*, 153 Mass. 487. *Smith* v. *Smith*, 157 Mass. 389. *Clark* v. *Clark*, 168 Mass. 523. Good reasons can be given for and against the rule, which we need not now consider.

In the practical application of it, difficulties are encountered when we attempt to draw the line between facts which indicate a mental condition, and a statement of the condition itself, and especially when we try to discriminate between facts given by way of description, which necessarily involve in their statement more or less of opinion as to familiar objects and well known matters, and the inferences and deductions from these facts, which take the form of direct opinion as to the mental condition of the person. An exception to the ordinary rule that witnesses cannot give their opinions in testimony allows them to state their judgment

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and estimate as to many things, such as the size, weight or color of objects, and the measurement of time or space. *Commonwealth* v. *O'Brien*, 134 Mass. 198. *Commonwealth* v. *Sturtivant*, 117 Mass. 122, 133. *O'Neil* v. *Hanscom*, 175 Mass. 313. Questions to such witnesses, bearing upon the mental condition of a testator, should be so framed as to call for facts and not for opinions. These facts, involving a narration and description of appearances and conduct and conditions may be such as cannot be given without including some element of opinion that comes within the exception stated above. A witness may properly be asked if he has observed any facts that have relation to the subject upon which information is sought. Such a question can usually be answered by "yes" or "no." If he answers in the affirmative, he may be asked to state what he observed. If the purpose is to prove a negative, the question may be so framed as to direct the attention of the witness to his observation as to peculiarities of speech or manner or conduct, or anything else indicating an unusual mental condition.

The question of the appellant to Mrs. French, "From these facts . . . what did you infer in your own mind as to Mr. Jordan's mental capacity?" was rightly excluded. It called directly for the inference and opinion of the witness as to the testator's mental capacity. The questions put by the executor, "Whether you noticed any failure of memory?" "Did you ever notice anything to indicate that he was not of sound mind?" were competent. They directed the attention of the witness to what he had noticed by way of external indications in regard to an internal condition, and they were put for the purpose of proving a negative. The question to Goodrich, "Whether or not you noticed any failure of intelligence on his [the testator's] part?" and the question to Hall, "Whether his memory was good or bad?" might be interpreted as calling for nothing but observation of external manifestations. It would be possible to interpret them as calling for an opinion as to the testator's mental condition. It would be easy for a judge directing the course of a trial to deal with such questions by requiring modification or explanation, or otherwise, in such a way as to preserve the rights of the parties, and leave no doubt as to the competency of the testimony admitted. The answers to these questions in the pres-

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ent case show that the inquiries were treated as calling for the observation of the witness, and in each answer the witness referred to what he had seen. There was no error in admitting the testimony as given in the answers. *Barker* v. *Comins*, 110 Mass. 477, 487. *Nash* v. *Hunt*, 116 Mass. 237.

One Middleton was asked, "When you last saw Mr. Jordan, what facts did you observe as to his powers of comprehension, mental grasp, coherency, power of reasoning, memory, intelligence, will and accuracy?" A similar question was put to one Kelly. The first witness answered, "His powers seemed to be complete and perfect." The second witness answered, "So far as I remember, each time that I saw Mr. Jordan I should say that he was in the possession of clear faculties and mental powers." These questions called only for the facts observed by the witnesses in reference to a stated subject. Neither of the answers was responsive. Neither witness stated anything that he had observed, but each volunteered a statement of his opinion as to the testator's condition of mind. It is hardly possible to conceive of a statement more directly presenting such an opinion than each of these answers. The appellant objected to each of the answers and moved that it be stricken out. The judge admitted them and the appellant excepted. There is no case in this Commonwealth that is a precedent for the ruling. The great reluctance of this court to set aside a verdict on account of the admission or rejection of some piece of evidence of slight importance, when it seems improbable that a different ruling would have changed the result, has often led to an adoption of the interpretation of the presiding judge when there is doubt as to the construction that should be put upon the testimony in reference to its competency. This has often been illustrated when it was uncertain whether the witness was giving an account of external indications, or a statement of his opinion as to a mental condition. In the present case there is no room for such doubt, and we are of opinion that the evidence ought not to have been admitted.

The appellant contends that there was error in the proceedings, after the case had been given to the jury. After the jury had been in deliberation about twenty hours, they were sent for by the presiding judge, and without a request for further in-

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structions, were given the instructions which appear in the record. They were told, in substance, that if they should conclude that there were some things in the working out of this will which might be unjust, they could not compromise it and say how it should be decided, as in an ordinary civil case, but that they must answer the questions, yes or no. The judge then suggested to them that if that should be their opinion, after having come to a decision upon the issues, there would be no objection to their stating in writing their recommendation as to what should be done by the parties by way of working a remedy for such injustice. The subject was presented to the jury pretty fully by the judge, who said, among other things, "The parties themselves would not be bound to carry out your suggestions, and perhaps the court could not, but possibly coming from the jury who had heard the whole case it might be of value and useful to the parties in working out what you regard as more even and adequate justice." This was on Friday, May 30, a legal holiday. None of the counsel engaged in the trial was in court when these suggestions were made. The court did not convene again until the following Monday. The jury continued their deliberations for about six hours and a half, and then apparently agreed upon a verdict for the executors, which they sealed up in accordance with the directions of the judge and brought into court the next Monday. The sealed envelope containing the verdict signed by the foreman, which was passed to the clerk when the jury assembled, contained also a paper of considerable length which recited that they were unable to arrive at a unanimous verdict, and that there was one juror, naming him, "who from the preponderance of the evidence in his mind, could not join in the verdict except upon protest." It then referred to the instructions of the judge in regard to submitting plans and propositions to be handed to the contestants, "if possible to enable them to arrive at some amicable settlement of the controversy without further recourse to the courts," and requested that the document be attached to the verdict and remain a part of it, and stated a proposition in four parts, for settling the estate, by a material change of the provisions of the will. This paper was unsigned, but was in the handwriting of one of the jurors. The envelope was opened by the clerk and the papers

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were exhibited to the court. The issues and answers were read to the jury, and when the usual question was put by the clerk to the jury as to the issues, the foreman answered to each, "We do"; but to the second and third, one of the jurors answered at the same time, "Under protest." That part of the second paper which stated the proposition for settlement was then read to the jury by the clerk, but the introductory part was not read. Upon its being read, no juror dissented. The judge then addressed the jury, thanking them for their service, and referring to their recommendations, which he said he understood to be the unanimous result of all their judgments (to which they all nodded assent), and told them that the suggestions would be conveyed to the parties who would have a right to take them and act upon them. He then excused the jury from further consideration of the case. At this point the juror who had answered, "Under protest," inquired of the judge whether, if the case was not settled in that way, the verdict would stand as a disagreement of the jury. The judge answered in the negative, with a brief explanation, when the juror began to make further statements, which the judge interrupted, declining to hear anything more at that time. On Monday forenoon the counsel for the appellant asked that an exception be noted to the instructions given on the preceding Friday. A question is reserved by the presiding judge in his certificate as to whether the exception taken on Monday forenoon could be allowed under Rule 48 of the Superior Court. An affidavit was made by the juror who answered "Under protest," in reference to his understanding of the verdict and the accompanying paper, in which he stated his purpose to say, when he was interrupted by the judge, that he dissented from the verdict. The appellant filed a "motion to make the record conform to the facts," asking the judge to expunge the answers of the jury to the issues and to record a disagreement of the jury. Upon the facts presented at the hearing of this motion, the appellant asked the judge to rule that there was no unanimous verdict, and that the record should be corrected by recording a disagreement of the jury. To the refusal so to rule he excepted.

On this part of the case the first question is whether the exception to the instructions given on Friday, May 30, was properly taken by a request made before noon on June 2. Rule 48 of the

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Superior Court is as follows: "When further instructions are given in the absence of counsel after the jury have retired, the presiding justice may permit exceptions thereto at any time within twenty-four hours next following." The court has power to instruct juries in the absence of counsel, and if the parties or their counsel fail to attend they might, if it were not for such a rule, lose their right to except to the instructions so given. *Kullberg* v. *O'Donnell*, 158 Mass. 405. *Rainger* v. *Boston Mutual Life Association*, 167 Mass. 109. *Tim* v. *Rosenfeld*, 168 Mass. 393. This rule of the Superior Court is reasonable, and should be held binding upon parties. Twenty-four hours after the instructions were given had elapsed on Saturday at ten o'clock in the forenoon, and the exception was not taken until nearly noon of the following Monday. We are of opinion, therefore, that this exception was not properly saved, and that it could not be allowed.

On the proceedings stated in the supplemental bill of exceptions, the validity of the verdict is called in question. Upon this question the instructions and their probable effect, the formal verdict, the accompanying paper, and the proceedings in court when the verdict was received, are all to be considered. There is no doubt of the power of the court to instruct the jury on a legal holiday or in the absence of counsel. R. L. c. 166, § 5; c. 158, § 4. *Kullberg* v. *O'Donnell*, 158 Mass. 405. The instruction given was unusual in kind, going considerably further in its suggestions of an inducement for an agreement than *Commonwealth* v. *Tuey*, 8 Cush. 1, which is often referred to in practice. The trial in the present case was a very long and important one, and it was right for the presiding judge to do everything that he properly could under the rules of law to assist the jury in coming to an agreement. There was nothing incorrect in the instructions given, and in the form of statement of the subject to which they related they were carefully guarded. But they were a voluntary presentation of a matter which was entirely outside of the issues to be decided, and they naturally would have a tendency to divert the attention of the jury from the real question which they were to decide. There is reason to fear from the language of the paper accompanying the verdict, that there was a misunderstanding of the probable effect of the

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paper on the part of some of the jurors. Without any inaccuracy in the statement of the presiding judge, some of the jurors may have been led to attach greater importance to their recommendation than it deserved, and to yield formal acquiescence in the verdict, while at the same time reciting in the paper that the jury were "unable to arrive at a unanimous verdict." The protest of one of the jurors when the verdict was received is significant, and it is impossible to know whether he would not immediately have declined to agree to the verdict, while the jury were before the judge and they were speaking of the case, if he had been permitted to speak further. We are by no means certain that there was a unanimous verdict of the jury, so obtained and so received as properly to be given effect.

But looking more narrowly at the questions raised by the supplemental bill of exceptions, we discover no error of law in the refusal to change the record and to treat the result as a disagreement. The jurors by their foreman had signed the verdict, it was affirmed, all the jurors assenting to it, although one said that he did it under protest. The judge was not bound to continue a colloquy with the juror after the verdict had been recorded. While the language of the accompanying paper and the conduct of the juror might well cause misgivings in regard to the verdict, there was no error of law in declining to treat it as illegally received and recorded. This exception is overruled, but by reason of error in the admission of evidence, the entry will be,

Exceptions sustained.

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MARY O'BRIEN *vs.* CONTINENTAL CASUALTY COMPANY.

Suffolk. December 7, 1903. — January 6, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Insurance, Life. Equity Jurisdiction.

The holder of an insurance policy, entitling him to a sickness indemnity of $35 a month and $100 for funeral expenses to be paid to his estate, signed an order to the insurance company directing the company to pay all money due on account of his policy to a certain creditor, and surrendered his policy to the company. Two days later, and before the company had acted on the order, the insured died intestate, without heirs or next of kin and with no creditors other than the payee of the order. The company refused to substitute the creditor as beneficiary under the policy, and the creditor brought a bill in equity to compel it to do so. *Held*, that the plaintiff was entitled to no relief, there being no privity between him and the company, and that his proper remedy would have been to have had an administrator appointed to collect the money on the policy.

BILL IN EQUITY, filed May 14, and amended November 25, 1902, praying that the defendant should be ordered to issue, in place of the policy issued to Cornelius Sullivan mentioned in the opinion, a new policy in which the plaintiff should be the beneficiary, and that the defendant should be required to pay to the plaintiff the amount due upon such new policy.

The defendant demurred to the amended bill. The Superior Court made a decree sustaining the demurrer and ordering that the bill be dismissed. The plaintiff alleged exceptions.

The substance of the bill is stated in the opinion. It alleged that the defendant was a corporation "established under the laws of the State of Indiana, for the purpose of transacting the business of insurance upon freight, money, goods and effects, and also the making of insurance on the life or health of persons, including the insurance of persons against disability from accident or sickness," and that it had a usual place of business in Boston.

C. L. Bremer, for the plaintiff.

W. F. Merritt & N. T. Merritt, Jr., for the defendant.

LORING, J. The plaintiff alleges that one Cornelius Sullivan, in his lifetime, was indebted to her, and that on March 12, 1902, two days before he died, he signed an order directing the

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defendant Casualty Company to "pay all money due on account of Policy Number 482498" at his death to the plaintiff, and surrendered said policy to the defendant. She further alleges that on September 23, 1901, the defendant issued a policy to Sullivan "by the terms of which a sickness indemnity of thirty-five dollars a month was payable to said Sullivan, and one hundred dollars was to be paid for funeral expenses to his estate, if he should die more than three months after the cause, resulting in his death, originated"; that a sum not exceeding $175 is due under the policy; that by the terms of the defendant's charter beneficiaries must have an insurable interest, and the defendant refused to make the transfer because the plaintiff had no insurable interest while in fact she had such interest, being a creditor of Sullivan as aforesaid; and lastly, that Sullivan died intestate without heirs or next of kin, leaving no debts other than the one due the plaintiff, and that no administrator of his estate has been appointed. On these allegations it must be assumed that the defendant's refusal to substitute the plaintiff as beneficiary was made after Sullivan's death.

It is plain that on the facts stated the plaintiff made a mistake in her remedy. She should have had an administrator appointed who could have collected the money due under the policy, and the money when collected would have belonged to the plaintiff or, under the circumstances alleged in the bill, would have had to be paid to her. The contract which the defendant made was with Sullivan, and there is no privity of contract between the company and the plaintiff. In *Atlantic Mutual Ins. Co.* v. *Gannon*, 179 Mass. 291, relied on by the plaintiff, the company was held to have assented to the substitution of the new beneficiary. In *Marsh* v. *American Legion of Honor*, 149 Mass. 512, also relied on by her, the substitution of the new beneficiary was prevented by the fraud of the former beneficiary, and the plaintiff went into equity for relief against that fraud, and it appeared that except for the failure to surrender the certificate the substitution would have been made in the lifetime of the member.

Decree affirmed.

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JOSHUA M. SEARS *vs.* GEORGE G. CROCKER & others.
MERCHANTS NATIONAL BANK *vs.* SAME.
JOHN C. GRAY & others, trustees, *vs.* SAME.

Suffolk. December 9, 10, 1903. — January 6, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Way, Extent of public easement. *Boston*.

Semble, that the owner of land taken for a street holds it subject to the right of the Legislature to appropriate the space above and below the surface as well as upon it, in any reasonable way, for the purposes of public travel, without providing compensation.

Under St. 1894, c. 548, and later statutes, the construction of the subway beneath the surface of Court Street and State Street in Boston imposes no additional easement on land owned by the abutters to the centre of those streets, and the Boston transit commissioners lawfully can construct such subways without taking in fee the land under the streets.

The provision in St. 1902, c. 534, § 19, that the city of Boston "shall have, hold and enjoy in its private or proprietary capacity, for its own property," the several subways and the tunnel built and to be built under that and former statutes, gives a title to the subways and tunnel merely as structures, and confers on the city no ownership of the land lawfully occupied by those structures.

THREE BILLS IN EQUITY, filed January 2 and March 20, 1903, by the owners of property on Court Street and State Street in Boston, owning the fee to the centre of those streets, to restrain the Boston transit commissioners from constructing a subway or tunnel through the land of the petitioners by authority of St. 1894, c. 548, St. 1895, c. 440, St. 1897, c. 500, and St. 1902, c. 534, without recording in the registry of deeds for the county of Suffolk a description of the land to be taken as required by St. 1894, c. 548, § 32, for any taking by right of eminent domain.

The cases came on to be heard before *Morton*, J., who, at the request of the parties, reserved them upon the bills, answers and agreed facts for determination by the full court, such decrees to be entered as equity and justice might require.

John Chipman Gray & E. W. Hutchins, for the plaintiff in the first case.

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L. S. Dabney & E. G. Loomis, for the plaintiffs in the second and third cases.

T. M. Babson, for the defendants.

KNOWLTON, C. J. These three cases present the same questions, and they may be considered together in one opinion. They are bills in equity to obtain an injunction against the defendants as members of the Boston transit commission, to prevent the construction of a subway and tunnel from Scollay Square to East Boston through public streets in front of the premises of the several plaintiffs, without a formal taking of land in the streets. The plaintiffs contend that the construction of the tunnel or subway, without a formal taking of land in the streets, is unauthorized and illegal, because it would impose an additional servitude upon lands previously taken for streets and in that way would deprive the plaintiffs of property as owners of the fee in parts of these streets, and because the St. 1894, c. 548, § 31, provides for the taking of property "held under or by title derived under eminent domain, or otherwise." They also say that their position is established and their contention confirmed by the provisions of the St. 1902, c. 534, § 19, that "The city shall have, hold and enjoy in its private or proprietary capacity, for its own property, the existing subway, the East Boston tunnel, the Cambridge Street subway and the tunnel and subway built under this act," etc.

The question whether the construction of the tunnel will create an additional servitude upon the plaintiffs' lands in the public streets lies at the foundation of these cases, and should be answered at the outset. The rules and principles applicable to such questions have often been considered by this court. *Attorney General* v. *Metropolitan Railroad*, 125 Mass. 515. *Pierce* v. *Drew*, 136 Mass. 75. *Lincoln* v. *Commonwealth*, 164 Mass. 1. *Howe* v. *West End Street Railway*, 167 Mass. 46. *White* v. *Blanchard Brothers Granite Co.* 178 Mass. 363. *New England Telephone & Telegraph Co.* v. *Boston Terminal Co.* 182 Mass. 397. *Eustis* v. *Milton Street Railway*, 183 Mass. 586. In the last two cases the doctrine was stated broadly, in accordance with previous decisions, that this public easement includes "every kind of travel and communication for the movement or transportation of persons or property which is reasonable and

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proper in the use of a public street." In the early settlement of the country and in the location of streets in later times, these ways were appropriated to the use of the public for the movement of persons and property from place to place, just as the adjacent lands were appropriated to the use of private owners. The original proprietors of lands in Boston and the original proprietors of lands in New York did not foresee the growth of population and business which has induced landowners in the largest cities to erect buildings fifteen or twenty stories high, or more, and to excavate under them basements and cellars and sub-cellars to be ventilated by the use of engines, to be lighted by electricity, and filled with merchandise. They did not think that the surface of the streets would be insufficient for the use of the people with convenience and comfort in moving to and fro and passing in and out in the transaction of business or the pursuit of pleasure. It is now a fact of common knowledge that the streets of those parts of Boston which are most crowded are entirely inadequate to accommodate the public travel in a reasonably satisfactory way if the surface alone is used. Our system, which leaves to the landowner the use of a street above or below or on the surface, so far as he can use it without interference with the rights of the public, is just and right, but the public rights in these lands are plainly paramount, and they include, as they ought to include, the power to appropriate the streets above or below the surface as well as upon it, in any way that is not unreasonable, in reference either to the acts of all who have occasion to travel or to the effect upon the property of abutters. The increase of requirements for the public within the streets of our large cities has probably equalled, if it has not surpassed the increase of requirements for business along the streets.

The Legislature, the guardian of public interests and of private rights, has determined that the space below the surface of certain streets in Boston is needed for travel. The question is whether action under the statutes involves an acquisition of a new right as against the landowner, or only an appropriation and regulation of existing rights. It hardly can be contended that this is an unreasonable mode of using the streets in reference either to travellers or abutters. If it is not an unreasonable mode of

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using them, the mere fact that it deprives abutters of the use of vaults and other similar underground structures in the streets, which they have heretofore maintained, is of little consequence. Abutters are bound to withdraw from occupation of streets above or below the surface whenever the public needs the occupied space for travel. The necessary requirements of the public for travel were all paid for when the land was taken, whatever they may be, and whether the particulars of them were foreseen or not. The only limitation upon them is that they shall be of a kind which is not unreasonable.

In the present case the travel which is being provided for is from place to place within the city. There are stopping-places on the subway at convenient points. In that respect it is different from a tunnel designed only or chiefly for travel for long distances. The new method is a substitution in part of a subterranean use of the streets for a use of their surface for the same general purpose. It is impracticable to have direct communication between the premises of abutters and the cars in the tunnel, but by going a short distance access to them may be had from any place. We are of opinion that this use of the streets is within the purposes for which the lands were taken and that no additional servitude is created by it.

The cases bearing upon this subject which have been decided in other courts differ so much from this in their facts and in the legislation to which they relate that they are not very important. See *Ramsden* v. *Manchester, South Junction & Altrincham Railway*, 1 Exch. 723; *In re New York District Railway*, 107 N. Y. 42, 52; *Hodgkinson* v. *Long Island Railroad*, 4 Edw. Ch. 411; *Adams* v. *Saratoga & Washington Railroad*, 11 Barb. 414; *Chicago* v. *Rumsey*, 87 Ill. 348; *Summerfield* v. *Chicago*, 197 Ill. 270, 282; *Baltimore & Potomac Railroad* v. *Reaney*, 42 Md. 117.

The authority to take lands, conferred upon the defendants by the St. 1894, c. 548, § 81, although it includes land taken and held under the right of eminent domain, does not imply that there is no right to use the public ways without such taking. Indeed, the first part of the section gives the right to use these ways before it refers to the subject of taking. It then goes on to authorize the taking of private property, and closes by giving a broad general authority.

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Nor is the St. 1902, c. 534, § 19, so significant in their favor as the plaintiffs contend. It declares that "the city shall have, hold and enjoy in its private or proprietary capacity, for its own property," the several subways and the tunnel built and to be built under the statutes that have been passed. This is in accordance with the previous intimations of this court as to ownership of the subway first constructed. *Mahoney* v. *Boston*, 171 Mass. 427, 429. *Browne* v. *Turner*, 176 Mass. 9, 13. But it does not purport to give a private proprietary right to anything more than the subways and tunnels as structures. It does not deal with the rights of the public to use the streets, or with any right of private property in the streets themselves. It leaves the subways lawfully resting in the public streets by virtue of the rights of the public therein, and it gives the city the same kind of ownership of the structures that gas companies and electric lighting companies have in their pipes and conduits, except that the city is charged with certain special trusts in the ownership of these subways. This provision of the statute does not purport to take from landowners on the streets any part of their property.

The statute gives damages to all persons injured in their property by the acts of the commission, but the question whether these plaintiffs are entitled to damages under this provision is not before us.

Bills dismissed.

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JOSEPH E. DOHERTY & others *vs.* MERCANTILE TRUST COMPANY & others.

Suffolk. December 11, 1903. — January 6, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Corporation. Equity Jurisdiction.

A stockholder, bringing a bill in equity to enforce rights of the corporation for its benefit, must show that he submitted to the directors the facts on which his bill is based, or show reason for not doing so. In such a case a naked request to the company to institute the proceedings is not sufficient.

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LORING, J. This is a bill in effect to enjoin the Mercantile Trust Company of New York from selling certain shares in the capital stock of the Boston Gas Light Company, the South Boston Gas Light Company, the Roxbury Gas Light Company and the Bay State Gas Light Company of Massachusetts. The bill was filed on January 30, 1903, and the sale is alleged to have been advertised to take place on the tenth day of February then next ensuing. The shares of the four Massachusetts gas companies in question were pledged with the trust company by one Addicks and one Dillaway, under two tripartite indentures dated January 1, 1889, to secure an issue of $12,000,000 Boston United Gas bonds, first series, and an issue of $4,000,000 Boston United Gas bonds, second series, some of which are outstanding. On March 13, 1889, Addicks and Dillaway sold and transferred these shares of stock to the Bay State Gas Company of New Jersey, subject to the pledge to the trust company, in consideration among other things of nine thousand nine hundred and fifty fully paid shares of the capital stock of that corporation. The capital stock of that corporation consisted of ten thousand shares. On August 9, 1889, Addicks and Dillaway sold and transferred to the Bay State Gas Company of Delaware the nine thousand nine hundred and fifty shares of stock in the New Jersey corporation mentioned above, for $5,000 in cash and nineteen thousand nine hundred and fifty fully paid up shares of that corporation. In the indentures of January 1, 1889, to which it was a party, the New Jersey corporation agreed to pay to the trust company any sum necessary to make up the interest, the sinking fund and other payments due under said indentures; and by an agreement between the New Jersey company and the Delaware company dated April 9, 1890, the Delaware company agreed to pay the New Jersey company the sums necessary to enable it to perform that covenant, and the New Jersey company assigned to the Delaware company any sums to which it might become entitled during the terms of the bonds aforesaid, as dividends on the stocks of said four Massachusetts gas companies.

The bill alleges a conspiracy to defraud the stockholders of the Delaware company of their interest in the four Massa-

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chusetts companies. The means of carrying this fraud into effect alleged in the bill were the omission to declare dividends although the earnings quite justified them, the creation thereby of a default and a foreclosure sale by the trustee of these shares of stock.

This suit is brought by persons who claim to be stockholders in the Delaware company. The case was sent to a master. When the plaintiffs' evidence in support of their right to maintain the bill had been put in, the defendants requested the master to report the facts on that point, and on the master's making a preliminary report on those facts they moved the court to dismiss the bill, on the ground that for various reasons stated in the motion it could not be maintained by the plaintiffs in its present form. The motion was overruled by the Superior Court and the question is here on a report as to the correctness of that interlocutory order.

It is enough to dispose of the interlocutory order that no proper steps were taken by these plaintiffs to get the Delaware corporation to bring a bill to enforce the rights which the plaintiffs are seeking to enforce in behalf of that corporation.

The rights which the plaintiffs seek to enforce are the rights of the Delaware corporation in the stock of the four Massachusetts gas companies mentioned above. The Delaware company had the right during the term of the gas bonds mentioned above to receive from the Mercantile Trust Company all surplus dividends of the four Massachusetts gas companies. This right was given to the New Jersey corporation by the tripartite indentures of January 1, 1889, and assigned by the New Jersey corporation to the Delaware corporation by the agreement of April 9, 1890. It had also an interest in these shares by reason of its being at least the beneficial owner of nine thousand nine hundred and fifty out of ten thousand shares in the capital stock of the New Jersey corporation which owned the shares of the four Massachusetts gas companies in question subject to the pledge. And the Delaware company, whose rights the plaintiffs now before the court seek to enforce, had the right to prevent a foreclosure sale by advancing to the New Jersey company the money necessary to keep the pledge good, to be by it used for that purpose.

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The New Jersey company was bound so to use it by the terms of the agreement of April 9, 1890, and the New Jersey company had the right and owed the duty of advancing these sums under the tripartite agreement of January 1, 1889.

There is no allegation in this bill and no evidence was introduced at the hearing that the directors of the Delaware company were parties to the fraud set up in the bill, or that for other reasons the plaintiffs were excused from making the proper effort to get them to enforce the rights of the Delaware company which they were elected to enforce and care for. All that the plaintiffs did to set the corporation in motion was to serve on one Donahue in Boston a letter to the "Bay State Gas Company of Delaware and to the President and Board of Directors of said corporation," and to mail the same letter addressed to the "Bay State Gas Co. of Delaware, J. Edw. Addicks, Wilmington, Delaware." Donahue was the secretary of the company in Boston, and the letter was served on him on January 24, 1903. The letter sent to the company at Wilmington was received by the assistant secretary of the corporation on January 28, 1903. No answer had been received from the letter when the suit was begun on January 30, 1903.

It is not necessary to go further in pointing out that this is not enough than to state that the letter is a naked request to the company to institute proceedings to stop the sale of the shares of stock of the four Massachusetts gas companies without stating or referring to the facts alleged in the bill or any facts at all on which such a bill could be founded. For all that appears the directors of the Delaware company were honest men, anxious and willing to protect the rights of the Delaware company, and if they had been informed of the facts set forth in this bill and satisfied of their truth, would have brought a bill to prevent the sale.

It is not enough to enable a stockholder to bring a bill to enforce in behalf of a corporation the rights which, if successful, will enure to the corporation, to make a naked request that such a bill should be brought without submitting to the directors the facts on which it could be maintained. See *Brewer* v. *Boston Theatre*, 104 Mass. 378; *Dunphy* v. *Traveller News-*

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paper Association, 146 Mass. 495; *Dillaway* v. *Boston Gas Light Co.* 174 Mass. 80. See also *Hawes* v. *Oakland*, 104 U. S. 450.

Bill dismissed with costs.

C. O. Engstrom, (*F. J. Humphrey* with him,) for the plaintiffs Doherty, Egan and Devine.

H. Dunham, (*H. D. Yeaton* with him,) for intervening plaintiffs.

J. L. Thorndike, for the Boston Gas Light Company and others.

F. E. Snow, for Kidder, Peabody and Company.

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HENRY A. LEONARD *vs.* FANNIE I. ELDRIDGE & another.

Bristol. October 27, 1903. — January 7, 1904.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Agency. Broker.

A broker, employed to sell certain real estate and discharged by his principal after failing to sell it, is not entitled to a commission on a subsequent sale of the property through another broker to a purchaser from whom the first broker had procured an offer which was not accepted.

CONTRACT by a broker for a commission on the sale of certain real estate on the corner of Summer and North Streets in New Bedford. Writ dated October 14, 1901.

At the trial in the Superior Court before *Fessenden*, J., it appeared, that the plaintiff was a real estate broker and that the defendants placed the property in his hands for sale, fixing no selling price; that the plaintiff in July, 1901, procured an offer of $5,400 and the taxes for that year, which amounted to $93.63; that this offer was submitted to the defendants and rejected; that the defendants discharged the plaintiff and placed the property in the hands of another broker; and that in October, 1901, the defendants sold the property through the second broker for $5,500. The judge instructed the jury that the defendants had a right to terminate their contract with the plaintiff, and if they terminated it unconditionally and the plaintiff knew and under-

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stood that he was discharged, the plaintiff could not recover. The judge put the special question to the jury, "Did the defendants terminate the employment of the plaintiff, and did the plaintiff assent to that termination?" The jury answered in the affirmative. The jury found for the defendants; and the plaintiff alleged exceptions.

M. R. Hitch, for the plaintiff.

R. F. Raymond & C. Mitchell, for the defendants.

HAMMOND, J. The plaintiff having failed to sell the property was discharged by the defendants in good faith, and he assented to the discharge. After that he had no right to act further for the defendants, and he so understood and made no further attempt in their behalf. Immediately after the discharge, the defendants employed one Bourne, a real estate broker and auctioneer, who soon afterwards offered the property at public auction, at which it was bid in by the defendants. Finally, in October, Vinal, the person who in July had made through the plaintiff the offer which was not accepted, made through Bourne another offer which was accepted.

In the absence of any express stipulation or usage to the contrary, there can be no doubt that the right of the principal to discharge at any time the broker is absolute. But it does not necessarily follow that the broker is thereby deprived of his commission where a sale is subsequently made to the person introduced by him. In *Sibbald* v. *Bethlehem Iron Co.* 83 N. Y. 378, 384, the following language is used: "If in the midst of negotiations instituted by the broker, and which were plainly and evidently approaching success, the seller should revoke the authority of the broker, with the view of concluding the bargain without his aid, and avoiding the payment of commissions about to be earned, it might well be said that the due performance of his obligation by the broker was purposely prevented by the principal. But if the latter acts in good faith; not seeking to escape the payment of commissions, but moved fairly by a view of his own interest; he has the absolute right before a bargain is made while negotiations remain unsuccessful, before commissions are earned, to revoke the broker's authority, and the latter cannot thereafter claim compensation for a sale made by the principal, even though it be to a customer with whom the broker unsuccessfully nego-

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tiated, and even though, to some extent, the seller might justly be said to have availed himself of the fruits of the broker's labor."

Without now deciding whether the rule stated in the last paragraph is of universal application, it is sufficient to say that it is applicable to the facts of this case, and that the instructions to the jury were correct. The doctrine of efficient cause has no application to a case like this.

Exceptions overruled.

GEORGE H. SELLECK & another *vs.* JAMES S. GARLAND.

Suffolk. November 9, 1903. — January 7, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Evidence, Burden of proof. *Payment. Practice, Civil*, Exceptions. *Evidence*, Best and secondary.

Where a plaintiff sues under an assignment held by him as security for a judgment, if the defendant relies on a payment of the judgment this is matter of defence which he must allege and prove.

Where a plaintiff, seeking to prove that the defendant's title to certain real estate had been confirmed by a judgment, called the defendant as a witness and the defendant admitted the fact without objection or exception, it was held not to be open to the defendant in this court to raise the point that his title by judgment being a matter of record could not be proved by his oral admission.

CONTRACT, on a contract in writing between Nathan M. Garland and others on the one part and the defendant on the other part, and assigned in writing by Nathan M. Garland to the plaintiffs as collateral security for the payment of a certain judgment in a city court of New York in favor of the plaintiffs against Nathan M. Garland for $677.78. Writ in the Municipal Court of the City of Boston dated April 26, 1902.

On appeal to the Superior Court the case was tried before *Lawton*, J., without a jury. The contract sued upon was dated in September, 1895, and was between John T. Garland, Jenny G. Hosmer and Nathan M. Garland, parties of the first part, and James S. Garland, party of the second part. It recited that one Smith had brought a suit in the State of Missouri

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against all the parties to the contract to set aside a deed to them of certain real estate in the city of St. Louis, and that the parties of the first part had conveyed to the defendant all their interest in the property and authorized him to defend the suit in their names, and the defendant agreed "that he will well and truly pay to said John, Jenny and Nathan respectively, the sum of one thousand dollars each, in good and lawful money of the United States, with all convenient speed after the title of said property shall have been confirmed and possession thereof been given to the said James S. Garland, his heirs or assigns, or in case of a compromise and settlement."

The ruling asked for by the defendant's second request, referred to by the court, was as follows: "That said assignment was not an absolute but was a qualified assignment conditional upon the non-payment of the judgment referred to therein; and there is no evidence that said judgment against said Nathan M. Garland has not been paid. Therefore the court rules that plaintiffs cannot recover in this action." The plaintiffs did not allege in their declaration that the judgment referred to in the assignment had not been paid, and no evidence on this point was introduced at the trial. The judge refused the request.

The ruling asked for by the defendant's sixth request, referred to by the court, was as follows: "That this defendant's title was not confirmed and possession of said real estate was not given to him until the first of October, 1901, and that at the time of this assignment and of the demand made upon him thereunder, to wit, on or about the first of March, 1902, a reasonable time had not elapsed in which to pay said one thousand dollars to said Nathan M. Garland." The judge refused this request.

The judge found for the plaintiffs in the sum of $933; and the defendant alleged exceptions.

W. H. Garland, for the defendant.

T. J. Barry, for the plaintiffs, submitted a brief.

LATHROP, J. The only questions argued before us are the refusal of the judge to give the second and sixth requests for instructions. The assignment was given as collateral security for the payment of a judgment. The gist of the second request is that there was no evidence that the judgment was not paid. A *prima facie* case having been made out by the plaintiffs, they

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were entitled to recover, unless the defendant showed that the judgment had been paid. Payment is a matter of defence, and if relied on by the defendant must be alleged and proved. *Hilton* v. *Smith*, 5 Gray, 400. *Noxon* v. *De Wolf*, 10 Gray, 343, 348. *Clark* v. *Murphy*, 164 Mass. 490.

The gist of the sixth request is that a reasonable time had not elapsed in which to pay the money. By the terms of the assignment, the money was to be paid "with all convenient speed" after the title to the property was confirmed, and possession given to the defendant.

We are of opinion that on the evidence there was enough to show that there was a breach of the agreement on the part of the defendant.

At the argument of the case the defendant contended that the confirmation of his title being by a judgment was a matter of record, and that his admission as to his title to the real estate could not be received in place of the record. The answer to this is that no such point was raised in the court below, or exception taken to the admissibility of the evidence of the defendant, who was called as a witness by the plaintiffs.

Exceptions overruled.

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BRIDGET O'BRIEN *vs.* CITY OF WOBURN.

Middlesex. November 10, 1903. — January 7, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Way, Defect in highway. *Evidence.*

In an action against a city for personal injuries from an alleged defect in a highway consisting of a water shut-off projecting above the travelled part of a sidewalk, the defendant, to show that a failure to remedy the alleged defect was not want of reasonable care, put in evidence, without objection, the number of miles of its streets, the value of its taxable property, the amount of money that could be raised by taxation and the amount appropriated and expended for highways. To meet this the plaintiff, on cross-examination of witnesses called by the defendant, showed that the shut-offs were taken care of by the water department and not by the highway department of the defendant and that the income of the water department exceeded its expenses. *Held*, that the evidence introduced on both sides was competent.

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The court cannot take judicial cognizance of a city ordinance.

By St. 1889, c. 387, § 1, (R. L. c. 175, § 78,) a city ordinance cannot be admitted in evidence unless it is attested by the city clerk.

Where in an action against a city it was competent for the plaintiff to show that the income of the water department of the defendant exceeded the expenses of that department, oral evidence of this fact was introduced. The defendant objected to this evidence on the ground that an ordinance of the defendant required records to be kept by each department of the city, and accounts to be kept of the money expended. The ordinance was not proved, and the court did not consider the question whether, if properly attested and put in evidence, the ordinance would have rendered the oral testimony inadmissible as not the best evidence.

TORT for personal injuries from an alleged defect in a highway of the defendant. Writ dated November 12, 1901.

At the trial in the Superior Court before *Fox*, J., the jury returned a verdict for the plaintiff in the sum of $1,300; and the defendant alleged exceptions.

F. P. Curran, for the defendant.

J. G. Maguire & G. L. Mayberry, for the plaintiff.

LATHROP, J. The plaintiff stumbled over a water shut-off in the sidewalk of Green Street in the defendant city, fell and sustained personal injuries for which she seeks to recover damages in this action. The shut-off was in the travelled part of the sidewalk, and extended above the surface thereof, according to some of the witnesses from a half inch on one side to an inch and a quarter on the other side, and, according to other witnesses, it so extended an inch and a half on one side and two inches on the other. It is not controverted that it was competent for the jury to find that this was a defect. *Redford* v. *Woburn*, 176 Mass. 520.

To show that, considering the number of miles of street the defendant had to care for, and the amount available for the work, its failure to remedy the defect ought not to be regarded as a want of reasonable care and diligence on the part of the defendant, it put in evidence, without objection, the number of miles of streets in Woburn, the valuation of the taxable property, the amount of money that could be raised by taxation, and the amount appropriated and expended for highways. This evidence was competent. *Rooney* v. *Randolph*, 128 Mass. 580. *Hayes* v. *Cambridge*, 136 Mass. 402, and 138 Mass. 461. *Sanders* v. *Palmer*, 154 Mass. 475. *Weeks* v. *Needham*, 156 Mass. 289.

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The only exceptions in the case are to two questions asked of two witnesses for the defendant, by the plaintiff on cross-examination. Spencer, the superintendent of the waterworks of the defendant city, was asked whether the water department or the highway department took care of the shut-off boxes between the water mains and the premises of private takers as to keeping them level with the sidewalk. The witness testified that the shut-offs were taken care of by the water department and not by the highway department. The other question was put to the city treasurer, and was whether or not the water department of the defendant was not supported by water rates charged to water takers and was not self sustaining, and whether the income so received from the water department did not more than pay the expenses of said department. The witness answered in the affirmative.

We see no objection to these questions and answers. They were clearly competent for the purpose of meeting the evidence put in by the defendant, and to show that the city had received from sources other than taxation sums of money which it had applied to remedy defects of the nature of the one in this case. See *Hayes* v. *Cambridge*, 138 Mass. 461.

One objection made to the first question was that the fact inquired of could not be proved by oral evidence. In support of this objection the counsel for the defendant has relied upon an ordinance of the defendant city, which he has set forth in his brief, and which requires records to be kept by each department of the city, and accounts to be kept of the money expended. The short answer to this objection is that it does not appear from the bill of exceptions that the ordinance was put in evidence in the Superior Court, nor were the ordinances handed to this court at the argument before us. The court cannot take judicial cognizance of a city ordinance. To admit an ordinance of a city in evidence it must be attested by the clerk of the city. St. 1889, c. 387, § 1. R. L. c. 175, § 73. Nothing of the kind appears here. It is unnecessary to consider, therefore, whether the ordinance, if properly attested and put in evidence, would have had any application to the question asked.

Exceptions overruled.

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LOUIS POST *vs.* A. S. LELAND & another.

Suffolk. November 16, 1903. — January 7, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Evidence, Best and secondary, Competency. *Practice, Civil*, Exceptions. *Wagering Contracts.*

It is proper to exclude secondary evidence of the contents of letters offered by a plaintiff who has testified that they were written to him by the defendant, and who successively has testified that the letters "might be lost, he did not know", that he had not any letters and that "we did not bring the letters here", and where there has been no attempt to show that any search was made for the letters or that they were lost.

In an action under St. 1890, c. 437, for money paid on wagering contracts, a plaintiff cannot be allowed to testify that when he received a notice from the defendants stating that they had "bought" certain stock on his account he did not understand what was meant.

The exclusion of evidence on the direct examination of a witness is no ground for exception if the evidence thus excluded was brought out later on his cross-examination.

In an action against a broker under St. 1890, c. 437, § 2, for money paid on margins, where it appeared that the defendant actually bought the stocks, received certificates for them and carried them for the plaintiff, although the certificates were not delivered to the plaintiff but were held by the defendant until they were sold for the benefit of the plaintiff, an instruction, that the plaintiff must show, by a fair preponderance of the evidence, that in his employment of the defendant he did not intend to have him buy any stock or sell any stock and that the defendant had reasonable cause to believe that the plaintiff did not intend to have him buy any stock or sell any stock, was held to be sufficient without using the language requested by the plaintiff.

In an action against a broker under St. 1890, c. 437, § 2, for money paid on margins, the fact that the defendant actually purchased the stock at the request of the plaintiff, and held it subject to his own control until his lien was paid, properly may be considered by the jury upon the question whether the defendant had reasonable cause to believe that the plaintiff was carrying on a wagering contract.

In an action against a broker under St. 1890, c. 437, § 2, for money paid on margins, the reading by the judge to the jury of an extract from the opinion of the court in *Rice* v. *Winslow*, 180 Mass. 500, 502, was approved as being a correct statement of the law which illustrated one phase of the case on trial.

Where one employs a broker to buy and sell stocks for him, and the broker actually buys the stocks with his own money and receives the certificates for them, and later the stocks are actually sold upon the order of the customer or under authority given by him, there is no wagering contract under St. 1890, c. 437, § 2, although the transactions are conducted without actual delivery of the certificates of stock to the customer.

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CONTRACT, under St. 1890, c. 437, for money alleged to have been paid on wagering contracts. Writ dated December 15, 1899.

At the trial in the Superior Court before *Bond*, J., the jury returned a verdict for the defendants; and the plaintiff alleged exceptions.

E. H. Savary, for the plaintiff.

B. L. M. Tower, (*E. O. Hiler* with him,) for the defendants.

LATHROP, J. This is an action of contract under the St. of 1890, c. 437, against brokers, to recover various sums of money paid by the plaintiff to the defendants as margin for the purchase of certain securities bought and afterwards sold by the defendants. The case was sent to an auditor, who found for the defendants. It was afterwards tried in the Superior Court before a jury. A verdict was returned for the defendants, and the case is before us on the plaintiff's exceptions to the exclusion of evidence, and to the refusal to give certain instructions requested. We will consider these in their order.

1. The first exception relates to the refusal of the judge to admit secondary evidence of the contents of letters from the defendants to the plaintiff. The plaintiff testified in the first place that he had received letters, but that they might be lost, he did not know. Then he testified that he had not any letters, which he subsequently qualified by saying: "We did not bring the letters here." There was no attempt to show that any search had been made for the letters or that they were lost, and the judge rightly excluded secondary evidence of their contents.

2. The plaintiff offered to show that when he received a notice from the defendants stating that they had "bought" certain stock on his account he did not understand what was meant. This evidence was rightly excluded. *Snell* v. *Snow*, 13 Met. 278, 282. But, if any error was committed, the plaintiff was not harmed by the exclusion of the evidence, as he subsequently testified on cross-examination that at the time he received the notice he could speak and write English only a little, and did not understand the notice at the time he received it. The exclusion of evidence at one stage of a trial is no ground of exception if it is subsequently admitted. *Robinson* v. *Fitchburg & Worcester Railroad*, 7 Gray, 92, 96. *Hopkins* v. *Damon*, 138 Mass. 65.

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3. The next exception relates to the exclusion by the judge of the answers, in whole or in part, to certain interrogatories put to one Berrenberg, whose deposition was taken by the plaintiff. It appeared that the witness was with the plaintiff several times when he visited the defendants in regard to the transactions in question. The answers to the 6th and 7th interrogatories were excluded. The last part of the answer to interrogatory 8, and the answers to interrogatories 13, 14 and 15 were also excluded. In his answer to the 5th interrogatory, which called for conversations between the plaintiff and the defendants or either of them, between the spring of 1893 and the late fall of 1894, the witness replied: "I overheard quite a number of conversations, but cannot recall particulars." So far as the answers to interrogatories 6, 7, 8, 14 and 15 are concerned, they were irresponsive and were properly excluded.

4. The fourth exception relates to the exclusion of two letters written by the defendants to the plaintiff's wife, relating to another transaction between her and the defendants. These were properly excluded.

5. The bill of exceptions states that at the close of the evidence the plaintiff asked the judge to instruct the jury as follows: "(1) The plaintiff can recover if he proves by a fair preponderance of evidence that he did not intend to perform the contract in question by the actual receipt and delivery of the securities and commodities, and the payment of the price either by the receipt and delivery himself, or by the defendants as his agents, of the securities and commodities, and the defendant had reasonable cause to believe that no intention so actually to perform existed." "(2) If the plaintiff had no intention at the time of the various contracts for the buying or sale of the various securities to actually perform the same by actual receipt or delivery of the securities and the payment of the price, and the defendants had reasonable cause to believe no intentions to actually perform existed, the mere fact that the defendants may have owned or controlled the various securities which were the subject matter of the various contracts, or that there was a buying or sale of the various securities by the defendants with other brokers will not relieve the defendants from liability, or the mere fact that the defendants were in a position to deliver the various securities, if they had been called for by the plaintiff."

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The judge declined to give these instructions.

As to the first request for instructions, the evidence showed that the case, if it was within the St. of 1890, c. 437, fell within the second clause of § 2, as the plaintiff employed the defendants to buy stocks for him upon a margin, and that the defendants actually bought the stocks, received certificates for them and carried them for the plaintiff, though these certificates were not delivered to the plaintiff, but were held by the defendants until they were sold for the benefit of the plaintiff. The judge was not bound to give the request in the language therein used, and the instruction given that the plaintiff must show, by a fair preponderance of the evidence, that in his employment of the defendants he did not intend to have them buy any stock or sell any stock, and that the defendants had reasonable cause to believe that the plaintiff did not intend to have them buy any stock or sell any stock was sufficient. See *Rice* v. *Winslow*, 180 Mass. 500.

The second request for instructions, if given, would have tended to mislead the jury. The fact that the broker has actually purchased the stock at the request of his customer, and holds it subject to his control until his lien is paid, is an element bearing upon the question of whether the broker has reasonable cause to believe that the customer is carrying on a wagering contract.

6. Some exceptions were taken to portions of the judge's charge, but we see nothing in them which calls for comment. The charge was an able one, and fully covered the questions raised.

7. The plaintiff excepted to the reading by the judge to the jury of the following extract from the opinion of the court in *Rice* v. *Winslow*, 180 Mass. 500, 502: "Where a broker is employed to buy and carry stocks on a margin, his relation to the customer in buying the stock is that of an agent. For the purchase of the stock the broker receives the same commission, and in the purchase of the stock he owes to his customer the same duty, that he owes to him, where he is employed to buy stocks, which are to be taken and paid for by the customer in place of being taken and paid for by the broker for the customer. The fact that after the stocks have been bought by the broker he is to actually receive them from the seller and to pay for them, for

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the most part out of his own pocket or with funds raised on his personal responsibility and the pledge of the stocks, and then carry them for his customer so long as his customer keeps him indemnified from loss by keeping the margin agreed upon good, and that in so carrying the stocks the relation between the customer and the broker is a contractual one, does not make the transaction a wagering transaction, and such a transaction is not within either clause of St. 1890, c. 437, § 2."

We see no objection to this. It is a correct statement of law, and illustrated one phase of the case before us.

8. The last exception relates to the refusal of the judge to give the following request for instructions asked for by the plaintiff at the close of the charge: "That as to whether the stock certificates were delivered or received by the plaintiff might be taken into consideration by the jury as bearing on the question whether the plaintiff intended the defendants or either of them to carry the stock for him and as to whether there was reasonable ground for the defendants to believe this."

We are of opinion that the refusal to give this instruction was right. It was entirely immaterial whether the plaintiff intended that the defendants, or either of them, should carry the stocks for him, or whether the defendants had reasonable ground to believe this. There was evidence in the case showing that the plaintiff employed the defendants as brokers to buy and sell stocks for him, and that the brokers actually bought the stocks with their own money, and received certificates for them, and that the stocks were actually sold upon the order of the plaintiff or under authority given by him. If the jury found that the facts were in accordance with this evidence, there was no wagering contract, but a legitimate transaction, although settlements were made without actual delivery of the certificates of stock to the plaintiff, and the case was not within the St. of 1890, c. 437. *Rice* v. *Winslow*, 180 Mass. 500. *Winward* v. *Lincoln*, 23 R. I. 476.

Exceptions overruled.

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AGENCY.

1. A broker, employed to sell certain real estate and discharged by his principal after failing to sell it, is not entitled to a commission on a subsequent sale of the property through another broker to a purchaser from whom the first broker had procured an offer which was not accepted. *Leonard* v. *Eldridge*, 594.

2. In an action by a farmer against a milk dealer for milk sold and delivered, it appeared, that the milk was put into cans furnished by the defendant and was collected from the plaintiff and other farmers by a teamster, who was paid by the defendant a fixed price for the transportation of each can, which was deducted from the sum agreed to be paid to the farmers. The teamster made his own arrangement with the farmers for the sum per can

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to be paid for the transportation. Each month a pass book was furnished by the defendant to the teamster, in which he recorded daily the number of cans of milk furnished by each farmer, and at the end of each month forwarded the book to the defendant. Certain of these pass books were admitted in evidence against the objection of the defendant. *Held*, that if, as seemed, the teamster was paid both by the plaintiff and the defendant, he was their common agent and the pass books were admissible against either. *Copeland* v. *Boston Dairy Co.* 207.

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1. When a contract to do work for a city is assigned as a whole after a part performance, the assignment includes all sums due for work previously done under the contract which have been retained by the city to ensure performance. *Chapin* v. *Pike*, 184.

2. An assignment of an unpaid balance due under a contract with a landowner for building a stable is not an assignment of future earnings, required by R. L. c. 189, § 34, to be recorded, to be valid against a trustee process, if the contract has been substantially performed and the landowner has accepted the stable, it having been completed with the exception of inserting a faucet for washing carriages, for which the owner has not designated the place, and some window fastenings of trifling value. *Allen* v. *Mayers*, 486.

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A trust company receiving a sum of money as a deposit for a person in another city with a request to notify that person by telegraph that the sum has been placed to his credit, if it credits the deposit and sends the telegram as requested, establishes the relation of banker and depositor, and can discharge its obligation only by paying the amount to or upon the order of the person to whom it is credited or his authorized agent. *Heath* v. *New Bedford Safe Deposit, etc. Co.* 481.

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BANKRUPTCY.

1. Under the bankruptcy act of 1898, if the holder of an unrecorded chattel mortgage, made two years before the bankruptcy of the mortgagor when he was not insolvent, first takes possession of the mortgaged property three weeks before the filing of the petition in bankruptcy, the mortgagor then being insolvent and the mortgagee having reasonable cause to believe him insolvent, the transfer dates from the time of taking possession and is voidable as a preference. *Tatman* v. *Humphrey*, 361.

2. Under the bankruptcy act of 1898 an adjudication in bankruptcy and the appointment of a trustee vest the title to the bankrupt's property in the trustee, and are a defence to an action of contract by the bankrupt pending at the time of the adjudication, unless it appears affirmatively that the action is being prosecuted by the trustee, or that the trustee has elected not to assume it. In order to prove an election by acquiescence, it is necessary to show the trustee's knowledge of the action, and such knowl-

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edge cannot be inferred from the fact that the action was pending in a court of general jurisdiction. *Atwood* v. *Bailey*, 133.

3. An insurance policy on property of a bankrupt, containing the usual clause requiring the written consent of the insurer in case of assignment, is property which prior to the filing of the petition the bankrupt could have transferred within the meaning of § 70 of the bankruptcy act of 1898, and vests in the trustee in bankruptcy upon his appointment and qualification. *Fuller* v. *New York Fire Ins. Co.* 12.
4. One holding a fire insurance policy filed a voluntary petition in bankruptcy and was adjudicated a bankrupt. A week later a receiver of his estate was appointed and afterwards on the same day the insured property was destroyed by fire. Six weeks later a trustee in bankruptcy was appointed who brought an action on the policy. The defendant contended that the bankrupt had ceased to have an insurable interest in the property at the time of its loss, and also that by the petition and adjudication the property was assigned without the assent of the insurer. *Held*, that the title to the property remained in the bankrupt until its destruction by fire when a right of action vested in the bankrupt which passed to the trustee upon his appointment and qualification. *Ibid.*

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1. One ratifying a signature on a promissory note purporting to be his and which he knows to be forged is bound by it. *Central National Bank* v. *Copp*, 328.
2. An instrument, which by its true construction is an unconditional order to pay a certain sum of money at a fixed future time to the payee or order, is a bill of exchange under R. L. c. 73, § 18. *Torpey* v. *Tebo*, 307.
3. In an action on a note payable absolutely, evidence is not admissible to prove an oral agreement that the maker of the note was not to pay it unless he received the amount of the note from another person. *Ibid.*
4. If the drawee who has written his name on the back of a draft, on its presentation to him as acceptor for payment, asks for time, and by agreement with the holder gives his promissory note payable at a future day for the amount of the draft, the note is founded on a good consideration whether or not the maker previously was bound as acceptor of the draft. *Ibid.*
5. The surrender of an overdue note, the indorser of which has been discharged from liability by want of notice of non-payment, is a good consideration for a new note given in part payment of the old one and signed as joint maker by the indorser of the old note, and in an action against such joint maker it is immaterial that he was not liable on the old note

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and received no personal benefit from signing the new one, if the plaintiff gave up the old note relying on his signature. *Nashua Savings Bank* v. *Sayles*, 520.

6. A bank in New Hampshire, holding an overdue note made and indorsed in this Commonwealth, asked the maker for a new note with the same indorser to take up the old one. The maker sent a new note for a smaller amount with a check for the balance, whereupon the bank returned the old note to the maker. The new note was made payable at the bank in New Hampshire and on the back was signed in blank by the indorser of the old note. Under the laws of New Hampshire a person so signing was liable as a joint maker without a demand on the other maker or a notice of his default. *Held*, that the new note first took effect as a contract when accepted with the check in payment of the old note, and was governed by the law of New Hampshire. *Whether*, if the new note had been for the full amount due on the old one, the fact that it was made payable in New Hampshire would have made it subject to the laws of that State was not considered. *Ibid.*

Payment.

7. A married woman, to shield her husband, ratified a signature on a promissory note to a bank, purporting to be hers but forged by her husband. At maturity the note was surrendered to the husband on his giving in renewal a note similarly forged which was accepted in good faith by the bank. In an action by the bank on the first note, it was *held*, that the substitution and acceptance of the second forged note did not constitute a payment, so as to bar an action on the note ratified by the defendant. *Central National Bank* v. *Copp*, 328.

8. Where a bank receives from another city for "collection and remittance" a note of one of its depositors payable at that bank and properly indorsed, having authority to pay notes of the maker out of his deposit when made payable there, and at the maturity of the note, after writing a check on a bank in the other city for remittance of the amount, stamps on the face of the note the word "Paid" with the date, cancels the note by perforation, and files it with the paid checks, this constitutes payment of the note as against an assignee for the benefit of creditors of the maker who gives notice to the bank by telephone of the assignment before the transaction has been entered on the permanent books of the bank and before the letter of remittance has been mailed. *Nineteenth Ward Bank* v. *South Weymouth Bank*, 49.

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BURNING INSURED PROPERTY.

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CARRIER.

1. Where in an action on a bill of lading for the loss of goods shipped by a vessel of the defendant, the defendant relies on the defence that the goods were inflammable and therefore within an exception which permitted such goods to be stowed on deck at the owner's risk, the burden of proof is on the defendant to establish this defence. *A. J. Tower Co.* v. *Southern Pacific Co.* 472.
2. In an action on a bill of lading for the loss of oiled clothing shipped by a steamship of the defendant, it appeared that the goods were lost by reason of being stowed on deck and that a clause of the bill of lading

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provided that all inflammable goods might be transported on deck at the owner's risk. There was uncontradicted evidence of a general usage of steamship companies to stow oiled clothing on deck and to class it as inflammable goods, and also that the plaintiff was the largest manufacturer of oiled clothing in New England and had for many years shipped goods to be carried by the steamship companies maintaining this usage. The trial judge ordered a verdict for the defendant. *Held*, that the case should have been submitted to the jury, as it was a question of fact and not of law whether the usage was proved and formed a part of the contract. *A. J. Tower Co.* v. *Southern Pacific Co.* 472.

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CHARITY.

1. The codicil of the will of Benjamin Franklin, proved in 1790, gave to the town of Boston a charitable fund, now held by the city of Boston as trustee, and directed that the fund should be "managed under the direction of the Select Men, united with the Ministers of the oldest Episcopalian, Congregational and Presbyterian Churches in that Town." At the time of the death of the testator there were nine selectmen. *Held*, that the selectmen as managers of the trust did not act as officers of the town, that the aldermen of the city of Boston were not their successors as such managers, and that, the selectmen having ceased to exist, the court sitting in equity would appoint, from the class of citizens indicated by the will, nine lay managers of the trust of whom the mayor of Boston *ex officio* should be one. *Boston* v. *Doyle*, 373.
2. Christ Church is the oldest Episcopalian church, the First Church is the oldest Congregational church, and the First United Presbyterian Church is the oldest Presbyterian church, in Boston, within the meaning of the terms of the trust created by the will of Benjamin Franklin proved in 1790, directing that the ministers of the oldest Episcopalian, Congregational, and Presbyterian churches in the town of Boston shall be members of the board of managers of that trust. *Ibid.*
3. The codicil of the will of Benjamin Franklin, proved in 1790, giving one thousand pounds sterling to the town of Boston as a charitable fund, contained the following provision: "If this Plan is executed and succeeds as projected without interruption for one hundred Years, the Sum will then be one hundred and thirty-one thousand Pounds of which I would have the Managers of the Donation to the Town of Boston, then lay out at their discretion one hundred thousand Pounds in Public Works which

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may be judged of most general utility to the inhabitants such as Fortifications, Bridges Aqueducts, Public Building, Baths, Pavements or whatever may make living in the town more convenient to its People and render it more agreeable to strangers, resorting thither for Health or a temporary residence." *Held*, that the words "lay out" in the foregoing provision mean more than the adoption of a plan for the use of the money in the way directed, and include the actual expenditure of it in the establishment of public works of the kind described, all of which is to be done by the board of managers as distinguished from the city of Boston, now holding the legal title of the fund, although the board could not compel the city to assume any burden of maintenance or otherwise involving the use of money to be raised by taxation. *Boston* v. *Doyle*, 373.

4. A board of managers of a charitable trust may act by a majority vote. *Ibid.*

5. The provision of R. L. c. 149, § 1, requiring the giving of bonds by trustees appointed by a probate court under a will, is not applicable to the managers of a charitable fund created by will. *Ibid.*

CHICOPEE.

1. An investigation by the board of aldermen of the city of Chicopee, of the granting of licenses by the licensing board of that city, is not a judicial proceeding, and consequently a writ of prohibition will not be issued to restrain the aldermen from conducting it. *Lodge* v. *Fletcher*, 238.

2. Under St. 1897, c. 239, the board of aldermen of the city of Chicopee cannot act in a judicial capacity in an investigation of the granting of licenses by the licensing board of that city. *Ibid.*

COMMON LANDS.

Right of way over, see WAY, 5.
Construction of deed describing, see DEED, 7.

CONFLICT OF LAWS.

Note sent in part payment of old note held to be governed by law of State where payee accepted it, see BILLS AND NOTES, 6.

CONSTITUTIONAL LAW.

Unconstitutionality of Part of Statute not affecting Whole.

1. The unconstitutionality of the provision for the assessment of betterments in St. 1891, c. 323, St. 1892, c. 418, relating to the location, laying out and construction of highways in the city of Boston, does not affect the validity of the other provisions of that statute. *Edwards* v. *Bruorton*, 529.

2. The provision of St. 1891, c. 323, § 9, St. 1892, c. 418, § 4, that no damage occasioned by the establishment or change of grade of a highway in

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the city of Boston shall be recovered by the owner of a building erected within the boundaries of any way shown on any of the plans previously filed by the street commissioners under that statute, and not removed at the expense of the owner on notice from the commissioners, is unconstitutional and void, but its unconstitutionality does not affect the validity of the other provisions of that statute, relating to the location, laying out and construction of highways in that city. *Edwards* v. *Bruorton*, 529.

Eminent Domain.

St. 1891, c. 323, § 9, St. 418, § 4, relating to effect of filing of plans by street commissioners of Boston, unconstitutional, as attempt to take property right without compensation, see *ante*, 2.

Vested Right.

Right of person who had brought action under St. 1890, c. 437, to recover money paid on wagering contracts, not property right, and its restriction by St. 1901, c. 459, constitutional as applied to pending cases, see WAGERING CONTRACTS, 1, 2.

Declaration of Rights.

R. L. c. 214, § 28, as to certain criminal pleadings, not in violation of Article 12 of Declaration of Rights, see LOTTERY, 6.

Ex post Facto Laws.

3. The provision of St. 1899, c. 409, § 12, (R. L. c. 218, § 38,) making a charge of "stealing" in an indictment good as a charge of embezzlement, is not unconstitutional as applied to offences committed before the enactment of the statute. *Commonwealth* v. *Kelley*, 320.

Obligation of Contracts.

St. 1896, c. 516, authorizing taking, for purposes of south terminal station in Boston, of portions of certain streets containing conduits of electric light company incorporated under Pub. Sts. c. 106, constitutional, see WAY, 12.

CONTRACT.

What constitutes.

1. In an action to recover for constructing and installing an elevator in a building of the defendant, if it appears that there was a contract in writing for the construction and installation of the elevator between the defendant and a person other than the plaintiff, and there is no evidence of an assignment to the plaintiff, the plaintiff may recover on showing that with the assent of all concerned the plaintiff and defendant made an oral agreement on the terms set forth in the written contract before any work was done under it. *Plunger Elevator Co.* v. *Day*, 130.
2. In an action for non-delivery of goods, under an oral contract of sale definite in all its terms except as to the time of payment, the fact that there was a subsequent misunderstanding and disagreement between the

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parties as to the terms of payment does not prevent the trial judge from finding what the parties ought to have understood the contract to be from the memorandum of the contract and their conversation, taken in connection with their previous dealings. *Morton* v. *Clark*, 555.

Agreement to pay partner for services may be inferred from facts. see PARTNERSHIP, 8.

Novation.

3. In an action against the assignee of a contract in writing, for a failure to make and deliver certain articles in accordance with the contract, the plaintiff, to recover, must show that he released the assignor from his obligation under the contract and accepted the defendant in his place, and that the defendant agreed with the plaintiff to perform the contract as his own. *Stowell* v. *Gram*, 562.

Implied: Common Counts.

4. One who voluntarily has made payments under a contract, and subsequently has broken the contract by failing to make other payments as they became due, cannot recover the money he has paid, if the other party did not break the contract and was ready to perform it. *Keefe* v. *Fairfield*, 334.

5. A person employed for one year to be paid a certain sum each week, under a contract which requires him to work overtime without extra pay not more than two hours in one day nor more than two months in the entire year, if wrongfully discharged before the end of the year, cannot sue on a *quantum meruit* for the overtime work alone, although he can sue on such a count for the value of all his services, crediting the amount received as part payment. *Posner* v. *Seder*, 331.

6. One employed under a contract and wrongfully discharged, in suing for the value of his services, need not return the money he already has received. It is sufficient if the amount received is credited upon his claim. *Ibid.*

7. One who has paid a sum of money under a contract in writing by which another agreed upon such payment to transfer to him a certain number of "pooling shares" in a certain company, upon showing a failure to transfer the shares after the expiration of the pooling agreement may recover back the money that he paid, and it is no defence to such an action that when the promise was made the plaintiff was connected with the pool as a member and trustee and was an officer of the company and there had been an overissue of stock. *Cary* v. *Leszynsky*, 44.

Obligation of trust company accepting deposit, see BANK.

City appointing license commissioner incurs no obligation to pay him reasonable compensation, see MUNICIPAL CORPORATIONS, 1.

No obligation on part of fraternal beneficiary association to repay assessments of suspended member, see FRATERNAL BENEFICIARY ASSOCIATION, 5.

Implied agreement of fraternal beneficiary association to levy assessment, see FRATERNAL BENEFICIARY ASSOCIATION, 1, 2.

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Consideration.

Granting delay to drawee good consideration for his note, see BILLS AND NOTES, 4.

Surrender of overdue note, on which indorser discharged, good consideration for his signature on new note, see BILLS AND NOTES, 5.

Validity.

For contract with attorney void for champerty; and as to suit to set it aside, see ATTORNEY, 1; EQUITY JURISDICTION, 7–9.

For actions for money paid on margins, see WAGERING CONTRACTS.

Construction.

As to times and mode of payment.

8. In an action for non-delivery of goods, under an oral contract of sale definite in all its terms except as to the time of payment, there was evidence that the payments were to be made upon drafts by the defendant on the plaintiff on sixty days' time, with occasionally one on ten days' time. The trial judge found this to be the fact, and that the term "occasionally" meant when the defendant was compelled to draw on short time by a reasonable regard for the exigencies of the business. *Held*, that the finding was justified, and that the explanation of the word "occasionally" was in accordance with its natural meaning when taken in connection with the facts and circumstances referred to when it was used by the parties. *Morton* v. *Clark*, 555.

Price of excavated material.

9. By a contract in writing the plaintiff agreed to excavate certain material, preparatory to the erection by the defendant of a building for the city of Boston. The contract provided that the plaintiff should "excavate all material, load and cart same to Columbia Road" at a designated place, the price for excavated material except loam to be sixty-two and one half cents per cubic yard, the loam to be placed on lot as directed by the defendant and to remain the property of the defendant, and the price for loam so placed to be twenty-five cents per cubic yard. Certain of the material not loam was excavated by the plaintiff but was not loaded or carted to Columbia Road. *Held*, that for this portion of the material excavated the plaintiff could recover only a reasonable price, which was found to be twenty-seven and one half cents per cubic yard, as the price of sixty-two and one half cents per cubic yard fixed by the contract included the loading and carting to Columbia Road as well as excavating. *Duncan* v. *Jacobs*, 123.

Claim for extra work by sewer contractor.

10. In an action by a sewer contractor against a town for compensation for extra work, the plaintiff is not entitled to recover outside of his contract by showing that the working profiles prepared by the engineer of the town, in accordance with which the work was performed, required deeper excavations than those required by the plans referred to in the contract, if the contract provides that the engineer may make alterations in the grade and

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that any increase in the amount of work thus caused shall be paid for according to the quantity actually done and at the prices established for such work under the contract and fixes the prices for excavations much deeper than those required by the profiles on file at the time of the contract, and it appears that the lowering of the grade required by the engineer was within the terms of the power given him by the contract. *Allen* v. *Melrose*, 1.

11. A contract to construct a system of sewers for a town provided that delay on the part of the sewer commissioners in furnishing materials should not give cause for claims for damages but that the time for completing the work should be so far extended as the engineer should judge necessary to compensate for such delay, and that alterations made in the form of the materials should be paid for at the price established for such work under the contract. In an action on this contract, it appeared, that there was a delay on the part of the defendant in furnishing sewer pipe and that the plaintiff was ordered by the defendant's engineer to lay the sewer of brick until the pipe arrived. A claim was made by the plaintiff for damage caused by the delay and for the expense of getting ready to lay the brick. *Held*, that the plaintiff could not recover on this item, as under the contract there could be no claim for damages for delay in furnishing the sewer pipe and the contract price for the masonry included the expense of getting ready. *Ibid.*

Building loan.

12. In an action for an alleged breach of an agreement in writing, it appeared, that the plaintiff, a builder, wishing to purchase a parcel of land on which was a mortgage for $10,800 and to build on it certain houses, applied to the defendant for a construction loan, that the defendant agreed to lend the plaintiff $36,000 on the houses to be erected, $20,000 when the houses, except the front walls, were built to the second floor, and the remaining $16,000 in instalments as the houses reached specified stages of completion, and the plaintiff agreed to build forthwith the houses on the land, and to give the defendant forthwith "a mortgage on said land which shall be a first mortgage when the first payment is called for", except that the defendant "may, if he desires, allow the present first mortgage of $10,800 with interest at four per cent per annum to remain on the land, provided he will assume same and pay interest thereon from date of first payment to us, which shall then be $9,200." The plaintiff purchased the land subject to the mortgage named, giving a second mortgage of $7,800 for the purchase money. He then gave to the defendant a mortgage for $36,000 on the property, and constructed the houses to the stage required for the first payment, when the alleged breach of the contract by the defendant occurred. *Held*, that the parties contemplated the payment of the pre-existing mortgages out of the first payment of $20,000 by the defendant, and that the plaintiff was entitled to look to that payment to make the mortgage for $36,000 a first mortgage. *Foternick* v. *Watson*, 187.

Of contract between town of Danvers and Commonwealth as to compensation for water, see WATERWORKS, 1.

Of assignment of contract to build bridge for city, see ASSIGNMENT, 1.

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Of provision in policy of fire insurance, see INSURANCE, 5.
Contract to sell milk means contract to sell milk of quality required by statute, see MILK, 1.
Certain provision in contract construed as agreement for liquidated damages and not for forfeiture, see *post*, 20.
For conduct of parties admissible to show their construction of a contract, see LANDLORD AND TENANT, 2.

Performance and Breach.

Plaintiff's readiness to perform.

13. In an action for the breach of an executory contract in writing in which no day of performance is named, the plaintiff, if he was not in default and was ready to perform, may recover without showing performance on his part, if he shows that the defendant left the Commonwealth in order to evade a tender of performance, or that the defendant wholly had repudiated the contract. *Foternick* v. *Watson*, 187.

14. In an action for a failure to deliver a deed of real estate purchased by the plaintiff at auction, it appeared, that by the agreement of sale the plaintiff, who had made a deposit, was bound to call at the office of the auctioneer within thirty days of the sale and be prepared then and there to take the deed and pay the balance of the purchase money, that three days after the sale the plaintiff requested the auctioneer to have the deed ready for him, and said that he would call for it in a few days, that five days later, after giving notice by telephone, the plaintiff with his attorney and two clerks came to the auctioneer's office and the attorney demanded the delivery of the deed to the plaintiff, saying "and here is your money." The auctioneer was not present and a clerk replied that the deed was not ready. The jury were instructed that the plaintiff must satisfy them that at the time of his demand he had with him a sufficient amount of money for the deed. The jury found for the plaintiff in a substantial amount. *Held*, that the question of the plaintiff's readiness to perform was a question of fact for the jury and was submitted to them properly. *Sirk* v. *Emery*, 22.

Present breach.

15. One who, in consideration of the agreement of a woman to serve him as housekeeper during his life, agrees that if she does so he will leave her $500 by his will, and thereafter wrongfully discharges her, depriving her of her board and lodging as housekeeper and the right to earn her legacy, commits a breach of his contract, which gives a present right of action to the person discharged. *Edwards* v. *Slate*, 317.

16. In an action against a railroad company for alleged breach of an agreement to employ the defendant as station agent at a certain station, so long as he should perform the duties of the place in a thorough, honest and business-like manner, a letter of the plaintiff, relied upon by the defendant to justify his discharge, contained the following: "I am ready to step out for thirty days if you will send a man to relieve me. . . . Will you please send man to commence June 16." *Held*, that, upon the facts appearing in the case, the passage quoted was not a notice of a refusal to act as station

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master for thirty days after June 16, but was merely a statement that the plaintiff was ready to "step out" in case the defendant would send a man to relieve him for those thirty days, and a request that the thirty days should begin on June 16, and that it did not constitute a repudiation of the contract on the part of the plaintiff or an absolute refusal to perform his obligations under it, which would justify the defendant in discharging him, even if such a notice of intended future action, however construed, would justify an immediate discharge. *Daniell* v. *Boston & Maine Railroad*, 337.

Promise to pay out of certain fund.

17. The defendant, a trust company, having underwritten a subscription for certain bonds of a company to be formed by a combination of corporations, agreed to pay the plaintiff for advertising the bonds in certain newspapers out of such money, securities or subscriptions as might be paid in. After the plaintiff had begun the advertising, the defendant obtained subscriptions for some of the bonds, on which a payment of ten per cent was made; but the defendant, finding that misrepresentations had been made as to the earning capacity of at least one of the combining corporations, cancelled its underwriting contract and returned to the subscribers the amounts respectively paid by them, without paying the plaintiff's bill. *Held*, that the defendant never received any money out of which the plaintiff's claim was payable, as, when the undertaking failed and no bonds were to be issued, the money received for the proposed issue of bonds belonged to the subscribers and the defendant rightly returned it to them. *Barron* v. *International Trust Co.* 440.

Waiver of breach.

18. A provision, in a contract for the sale of land to be paid for in instalments, that on a failure to pay an instalment, lasting for a certain period, the vendor at his election may treat the contract as void and retain as liquidated damages the money previously paid under it, is not waived as to future instalments by the vendor accepting payments after defaults have been made. *Keefe* v. *Fairfield*, 334.

19. In an action against a railroad company for wrongfully discharging the plaintiff from its employ, it appeared, that the defendant by a contract made in Vermont agreed to employ the plaintiff as station agent at a certain station in Vermont so long as he should perform the duties of the place in a thorough, honest and businesslike manner, and that by the law of Vermont if a superintendent, having authority to do so, allowed a delinquent employee to continue in the employ of the company subject to certain discipline, such action waived the company's right to discharge the employee for any breach of duty that already had occurred. It further appeared, that after the plaintiff had been delinquent in his duty as telegraph operator at the station, the defendant's superintendent wrote to him as follows: "While I should not wish to apply discipline against you on account of it if it was the first case of this kind, must do so in view of the frequent trouble we have with your office in connection with telegraphing and you must if you wish to remain there so conduct the office as to avoid

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these complaints." The discipline referred to was a system of demerit marks. *Held*, that the defendant elected not to discharge the plaintiff for the breach of duty referred to in the letter of the superintendent, although it did not waive its right to take his delinquencies into account in connection with any future breach of duty on his part. *Daniell* v. *Boston & Maine Railroad*, 337.

Claim for extras and for damages for delay under contract to construct sewer, see *ante*, 10, 11.

For contract substantially performed so that assignment of balance due under it is not assignment of "future earnings," see ASSIGNMENT, 2.

Rescission.

Action to recover back money paid under contract where defendant has wholly failed in performance, see *ante*, 7.

Damages.

20. A provision, in an agreement for the sale of land to be paid for in monthly instalments, that, on the failure for a period of thirty days to pay an instalment, the vendor at his election may treat the contract as void and have the right to retain for his own use as liquidated damages all money previously paid under the contract, will be enforced as an agreement for liquidated damages, and not treated as declaring a forfeiture on such failure upon which actual damages should be assessed. *Keefe* v. *Fairfield*, 334.

CORPORATION.

1. A stockholder, bringing a bill in equity to enforce rights of the corporation for its benefit, must show that he submitted to the directors the facts on which his bill is based, or show reason for not doing so. In such a case a naked request to the company to institute the proceedings is not sufficient. *Doherty* v. *Mercantile Trust Co.* 590.

2. By St. 1826, c. 31, incorporating the Watuppa Reservoir Company, that company was authorized "to make reserves of water in the Watuppa Ponds, so called, by erecting a dam across the outlet of said ponds, in the town of Troy", so as to raise the water in the ponds to a specified height, and to acquire and hold real estate for this purpose, by purchase or otherwise. The company erected a dam in the town of Troy across the Fall River, which is the outlet of the Watuppa Ponds. Some of the land between the dam and the ponds was then in the State of Rhode Island, and the corporation by deed and prescription claimed the right to flow it. *Held*, that the company by its charter had the right to raise the waters not only of the ponds but of the river below for a reasonable distance, and that the fact that the land between the dam and the ponds was in another State did not make the conduct of the corporation *ultra vires*. *Phillips* v. *Watuppa Reservoir Co.* 404.

Taxation of stock of corporation purchased by itself and held for its benefit by trustee, see TAX.

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COVENANT.

Covenant in deed as to height at which dam may be maintained, held not to apply to certain land, see DEED, 8.

Enforcement of restrictive agreement, see EQUITABLE RESTRICTION.

CUSTOM.

Existence of usage to stow oiled clothing on deck and to class it as inflammable goods, held to be question of fact, see CARRIER, 2.

Custom, to be binding on municipal corporation, must be adopted by vote, see MUNICIPAL CORPORATIONS, 3.

As to evidence, on issue of plaintiff's due care, of custom of other workmen in similar situation, see NEGLIGENCE, 38.

Custom of operatives to use trap door in floor of mill as passageway not evidence of invitation to do so unless known to proprietor, see NEGLIGENCE, 45.

DAMAGES.

1. An agreement by a railroad company, to employ a person as station agent at a certain station so long as he performs the duties of the place in a thorough, honest and businesslike manner, may entitle the employee thereunder to substantial damages in case of his wrongful discharge. *Daniell* v. *Boston & Maine Railroad*, 337.

2. In an action for an injury to the plaintiff's vessel from grounding on a ledge of rock in the defendant's dock, a ruling, that if the defendant was liable the plaintiff was entitled to recover the fair value of the vessel to the plaintiff during the time needed to repair her, was stated by the court to be correct in law, although the finding of the trial judge made it immaterial. *Garfield, etc. Co.* v. *Rockland-Rockport, etc. Co.* 60.

Agreement to pay counsel fees admissible on question of indemnity for loss, see OFFICER, 3.

Certain provision in contract construed as agreement for liquidated damages, and not for forfeiture, see CONTRACT, 20.

As to damages awarded to railroad company in alteration of crossing of highway and railroad, see RAILROAD, 1–3.

Cost of new station, and of counsel and expert witness' fees as part of cost of alterations under grade crossing act, see GRADE CROSSING ACT, 1, 3.

Construction of words "damage to and value of . . . business" in St. 1895, c. 488, § 14, see METROPOLITAN WATER SUPPLY ACT, 1.

Indirect damage to property in Clinton, see METROPOLITAN WATER SUPPLY ACT, 2.

Draining of well as special and peculiar damage, see METROPOLITAN WATER SUPPLY ACT, 3.

For interest as damages, see INTEREST; POOR DEBTOR, 6.

DECEIT.

A count in tort, containing allegations of false and fraudulent representations as to other matters, alleged that the defendant, a corporation, represented to the plaintiff that if he would purchase certain shares of the

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defendant's stock for $9,000 that sum should be put into the defendant's treasury to be used for working capital, and that the plaintiff purchased the stock, but that the $9,000 was not put into the defendant's treasury and used as working capital, but was used for other purposes. *Held*, that no damages in deceit could be allowed upon these allegations, which merely set forth the defendant's failure to carry out its promise, without any averment that the defendant at the time the promise was made did not intend to carry it out. *Whether*, under any circumstances a false representation as to a present intention, if properly alleged and proved, would support an action of deceit, was not considered. *McComb* v. *C. R. Brewer Lumber Co.* 276.

For false representation by agent as to kind of purchaser for whom acting, constituting actionable fraud, see EQUITY JURISDICTION, 3.

Guardian has no right of action for false representations injuring ward's estate, see GUARDIAN, 1.

DEED.

Boundary on Private Way.

1. A boundary in a deed running from "a stake and stones near an old road leading to the shore; thence by said road . . . to a stake by a pair of bars", where the road was over land of the grantor and the use of such a way was required for the reasonable enjoyment of the land conveyed, was held to include the fee to the centre of the road, and also a right of way to the grantee in common with others over the whole road. *McKenzie* v. *Gleason*, 452.
2. A boundary in a deed by the nearer side line of a road over land of the grantor excludes the road, and the grantor is not estopped to deny its existence. *Ibid.*
3. By a deed of land bounding on a private road over land of the grantor, the grantor is estopped to deny the existence of the road, and the grantee acquires a right of way through the entire length and width of the road as it existed upon the land of the grantor when the deed was given. *Ibid.*

Reservation.

4. In a deed of a building lot the words "reserving to the lot next southerly owned by G. the right to enter a drain into a private sewer now on said land", where no such right in G. already exists, do not constitute an exception, but create a reservation, enuring solely to the grantor and giving no easement to G., a stranger to the deed. *Haverhill Savings Bank* v. *Griffin*, 419.

Appurtenances.

5. Under a deed which contains no express grant of a right of drainage, the right to maintain a drain not in existence when the deed was given cannot pass by implication as appurtenant to the land. *Haverhill Savings Bank* v. *Griffin*, 419.

Construction.

6. A conveyance by deed, to a corporation authorized to maintain a reservoir, of the right "to flow and overflow" the grantor's land described in

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the deed, grants by implication the right to have the land left as a part of the reservoir to be filled with water. *Phillips* v. *Watuppa Reservoir Co.* 404.

7. A description in a deed from a religious society to a town of certain premises conveyed as "all the land now used as a common, containing two acres more or less, lying between" three streets named, followed by a covenant of the grantee that the land south of a certain row of trees should be forever used by the town as a common, was held to convey all of a triangle of land between the three streets named and to describe it as used as a common and containing two acres, and not to purport to convey only so much of the land described as then was used as a common. *McKay* v. *Reading*, 140.

Application of Covenant.

8. In this suit in equity to restrain the defendants from injuring the plaintiffs' land by maintaining a dam above the height prescribed by the terms of a certain indenture it was *held* that upon the facts stated in the opinion the covenant sought to be enforced did not apply to the parcel of land owned by the plaintiffs. *Carmichael* v. *Henry Wood's Sons Co.* 73.

As to deed executed with name of grantee left blank, see EQUITY JURISDICTION, 2.

DEVISE AND LEGACY.

Construction.

What estate passes.

1. A testatrix having shown by other parts of her will a disposition to treat two of her daughters, M. and A., equally, gave to M. one half of certain real estate in fee, and then provided as follows: "I give, devise and bequeath to my said daughter M. the other undivided half of my said real estate, to have and to hold to her and her heirs and assigns forever, but in trust nevertheless for the use and benefit of my daughter A.; it being my desire that my said daughter A. should have the full benefit of said undivided half, but to have no power to dispose of the same by deed or otherwise." *Held*, that A. took an equitable fee in the undivided half of the real estate, which on her death became executed in her heirs by the statute of uses, so that they became seised of the legal estate as if she had died seised in fee simple. *Powers* v. *Rafferty*, 85.
2. A will, after giving certain legacies, contained the following: "I give, devise and bequeath to my niece, S. my present housekeeper, all the rest and residue of my estates, both real and personal that I may die possessed of, after paying the above named legacies and my funeral expenses and all other debts that I may be owing at my decease (if any) and after the payment of the above named debts and legacies I hereby give her, my said niece, S. full power to do with the remainder of my said estates as she may deem most proper during her natural life." By a codicil the testator gave $500 to the treasurer of a certain cemetery for designated purposes "providing there should be so much remaining or whatever there

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might be remaining at the decease of my niece S. and the payment of all her funeral and legal expenses are paid." *Held*, that S. took a fee in the real estate and an absolute estate in the personal property, the words as to the power to dispose of the property during her life being superfluous, and that the bequest in the codicil to the treasurer of the cemetery was void as an attempt of the testator to control after the death of S. property which he had given to her absolutely. *Bassett* v. *Nickerson*, 169.

"Their natural life." Distribution after life interest.

3. A will gave a fund to trustees to pay the income to the testator's three children named "equally, annually, or semi annually, as they may prefer during the term of their natural life and to divide after their decease the rest and residue of the trust premises aforesaid under their charge equally among my children then living, and the issue of any deceased child or children giving to the issue of any deceased child the share to which the parent if living would have been entitled." *Held*, that each of the testator's three children was entitled to the income of an undivided third of the trust fund during his or her life, and that on the death of each there was to be a distribution of one third of the principal among the children of the testator then living and the issue of deceased children *per stirpes*, including the issue of the beneficiary for life of the third of the fund being distributed. *Brown* v. *Farmer*, 136.

Amount to be deducted from share of child.

4. A testator left all his property remaining after the death of his wife to his three children "to be divided among them equally, except that, whatever shall at my death be due me from K. individually or from the firm of K. and Company . . . shall be deducted from the share of my said daughter N. and reckoned as part of her one third in the clause given to her." K. was the husband of the daughter named. Both K. and the testator had been members of the firm named, but it was dissolved by an agreement of liquidation made nearly two years after the will was executed and only six days before the death of the testator. By this agreement the testator and a third partner assumed the firm debts and conveyed to K. certain firm property on his agreeing to give his personal services without compensation to liquidating the business and to pay the testator and the other partner a certain amount, for which he gave notes to each of them. *Held*, that the only deduction to be made from the share of the daughter was the amount of notes of K. held by the testator at the time of his death, all debts to the testator from the firm having been extinguished by the dissolution and the liquidation agreement. *Held*, *also*, that, on the notes of K. to be deducted, interest was to be reckoned only to the time of the testator's death, *and*, *also*, that the notes of K. should be transferred to the testator's daughter N. or the administrator of her estate, and that the amount of the notes with interest to the death of the testator was to be reckoned in ascertaining the whole fund to be divided. *Howe* v. *Howe*, 34.

Substituted legacies.

5. A testator knowing that his property was diminishing and being in doubt

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whether it would be sufficient to carry out the provisions of his will, made a codicil beginning: "My estate real and personal I bequeath as follows". Then came various cash legacies corresponding to legacies in the will to the same persons, the language following that of the corresponding clauses in the will. A person given in the will $5,000, payable out of the first moneys in the hands of the executors was given by the codicil $3,000 thus payable and "the further sum of $2,000 which shall first appear to be a residue thereof." Six persons given $1,000 each in the will were given $800 each by the codicil, and three persons given $500 each in the will were given the same amount by the codicil. Other cash legacies in the will were not referred to in the codicil. The general scheme of the will tended to show that the testator intended the cash legacies to be paid from certain personal property which might have been insufficient for the purpose if the legacies given by the codicil were cumulative. On a bill for instructions it was *held*, that the legacies given by the codicil were in substitution for those given to the same persons by the will. *Gould* v. *Chamberlain*, 115.

Evidence of Attending Circumstances.

Substituted legacies.

6. On the issue of the interpretation of a codicil to determine whether certain legacies given by it were in addition to or in substitution for legacies given to the same persons by the will, evidence is admissible that the testator knew before the date of the will that he was living on a steadily diminishing principal and that his expenses annually exceeded his income, that after the execution of the will and before the execution of the codicil, when told by his attending physician how long he might live, he replied that in such case he would make greater inroads upon his principal than he had expected to, and that twice before the execution of the codicil he consulted one or more of the persons named as his executors on the question whether his estate was sufficient to carry out the provisions of his will and said that he doubted whether it would be sufficient. *Gould* v. *Chamberlain*, 115.

Computation of Income.

7. Where a sum of money is given by will in trust for the benefit of a person for life, the income to which the beneficiary is entitled under R. L. c. 141, § 24, from the death of the testator until the legacy is payable to the trustee, is to be determined by the actual income that the fund would earn if properly invested without regard to the rate of interest established by law. *Loring* v. *Thompson*, 103.

Abatement of Legacies.

8. A testator gave two certain sums of money to trustees to pay the net income of each fund to a legatee for life with a remainder to others. He gave a third sum of money to a legatee absolutely. At the end of a year from the death of the testator the amount available for the legacies was in the hands of the executor but the estate was insufficient to pay the legacies in full. *Held*, that the legacies abated proportionally, but that the income upon the trust funds that would have been earned if they had been

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invested by a trustee during the year after the death of the testator was to be included in determining the proportions. *Loring* v. *Thompson*, 103.

DISSEISIN.

1. Where a strip of land, enclosed with a dwelling house and lot, is occupied and used by successive grantors of the dwelling house and lot as if belonging to the premises, although not included in the description in any of the deeds, the maintenance of possession of the house and strip by the successive owners as if they belonged together, creates a presumption of fact that the seisin and possession of the strip was in each case transferred at the same time as the seisin and possession of the house and lot. *Wishart* v. *McKnight*, 283.
2. Where a strip of land is enclosed by a fence as if it belonged to an adjoining dwelling house and lot, and always is used with the house, which cannot be entered without passing over it, and the strip is not occupied or used otherwise than with the house, if the owner of both the strip and the house sells the house while a tenant is in possession of it and gives a deed which does not include the strip, it may be inferred, that possession of the strip was given by the landlord to the tenant, and afterwards was surrendered by the tenant to the landlord, and that, upon the sale of the house, possession of the strip was transferred to the purchaser with the seisin and possession of the house and thenceforth was adverse to the landlord. *Ibid.*

DOMICIL.

As to settlement of married women, see PAUPER.

DOWER.

Claim of dower not brought before court by suggestion of husband's death without further proceedings, see EQUITY PLEADING AND PRACTICE, 4.

DRUNKENNESS.

1. Under R. L. c. 212, § 39, one may be convicted of "drunkenness by the voluntary use of intoxicating liquor" although the offence was committed in a private dwelling house without causing public disturbance. *Commonwealth* v. *Conlin*, 195.
2. If a defendant is brought regularly before a court to answer to a complaint for drunkenness under R. L. c. 212, § 39, it is immaterial upon the issue of his guilt whether he was arrested legally or illegally, or was arrested at all, before the complaint was made. *Ibid.*

EASEMENT.

Where a right by prescription to flow certain land is claimed by a corporation, authorized to maintain a reservoir, founded on an open continuous

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adverse use of the land for flowing for more than seventy-five years, a deed to the corporation from a former owner of the land, which for want of proper recording was not effectual to pass a title except between the parties to it, purporting to convey the right "to flow and overflow" the land, is admissible in evidence to show the nature of the use, in reference to the right claimed to be exercised in keeping water on the premises. *Phillips* v. *Watuppa Reservoir Co.* 404.

Conveyance of right "to flow and overflow" land, see DEED, 6.

Grantee obtains no easement by implication not in existence when deed was given, see DEED, 5.

The reservation of an easement for the benefit of adjoining land owned by another, named, enures only to the grantor and gives no right to the owner of the adjoining land, a stranger to the deed. *Haverhill Savings Bank* v. *Griffin*, 419.

Equitable restriction imposed by deed cannot enure to benefit of unrestricted land owned in common by grantor and another not party to deed, see EQUITABLE RESTRICTION.

ELECTIONS.

The laws incorporated in R. L. c. 11, deal with the whole subject of illegal voting, including bribery at elections, and provide no punishment for a voter receiving a bribe, superseding the common law in this regard. *Doyle* v. *Kirby*, 409.

No crime for voter at election to sell his vote, see SLANDER, 1.

ELECTRIC LIGHT COMPANY.

Negligence of, see NEGLIGENCE, 39–41.

Nature of rights of electric light company maintaining wires under streets, see WAY, 11, 12.

ELEVATOR.

Injury by opening of trap door over elevator well as plaintiff was walking over it, see NEGLIGENCE, 44, 45.

Person injured by elevator cannot excuse his want of care by absence of warning device required by recent statute of which he had no knowledge, see NEGLIGENCE, 46.

Action against owner of building by employee of tenant injured by falling down elevator well on way to work, see NEGLIGENCE, 31.

EMBEZZLEMENT.

Under R. L. c. 218, § 38, charge of "stealing" includes embezzlement, see PLEADING, CRIMINAL.

Provision of R. L. c. 218, § 38, making charge of "stealing" good as charge of embezzlement, constitutional, see CONSTITUTIONAL LAW, 8.

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EQUITABLE RESTRICTION.

An equitable restriction imposed by a deed cannot enure to the benefit of unrestricted land owned in common by the grantor and another not a party to the deed. *Hazen* v. *Mathews*, 388.

In absence of evidence on subject, law of New York as to equitable restrictions presumed to be same as common law of this Commonwealth, see EVIDENCE, 19.

EQUITY JURISDICTION.

Other Remedy.

1. The fact that a plaintiff in equity could have set up the facts on which he relies as an equitable defence to an action at law does not deprive this court of jurisdiction in equity. *Gargano* v. *Pope*, 571.

Bill in equity can be maintained to restrain continuing trespass notwithstanding right of action at law for past trespasses, see WAY, 1.

To set aside Deed obtained by Fraud.

2. If one executes and acknowledges a deed of real estate, with the name of the grantee left blank, and temporarily intrusts it to another, on his representation, that he wants to show it to a friend who is going to let him have part of the purchase money, and that he will return it in a few minutes, and if the person thus obtaining the deed fraudulently inserts his name in the blank and mortgages the property to a savings bank which lends him money on it in good faith, this does not preclude the signer of the deed from asserting his title against the bank, and he may maintain a bill in equity to set aside the deed and cancel the mortgage. *Westlake* v. *Dunn*, 260.

To compel Reconveyance of Land obtained by Fraud.

3. In a suit in equity to compel a reconveyance to the plaintiff of a certain lot of land alleged to have been sold and conveyed by him upon the false and fraudulent representations of the agent of the purchaser, it appeared, that the purchaser's agent represented that his principal was a man with a wife and two children employed by a railroad corporation at a salary of $6,000 and was able to build and occupy a good dwelling house; that the plaintiff thereupon sold and conveyed the land to the agent for his undisclosed principal, to whom the agent conveyed it; that the purchaser was the Roman Catholic Archbishop of Boston, a corporation sole, and at once proceeded to erect a Roman Catholic chapel on the lot; that the purchaser's agent knew that the plaintiff had a prejudice against Roman Catholics, and had concealed the identity of the purchaser and the proposed use of the land for that reason. The deed contained restrictions as to the use of the land, which did not prohibit the use in question. The plaintiff paid a part of the commission of the purchaser's agent. The purchaser was ignorant of the agent's fraud. *Held*, that the representations of the purchaser's agent constituted an actionable fraud; *also*,

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that the fraudulent deceit as to the kind of purchaser to whom the plaintiff was selling was independent of the restrictions in the deed and not affected by them; *also*, that the rights of the plaintiff were not diminished by the fact that he paid a part of the commission of the purchaser's agent, and that, as it appeared that the agent was acting for the purchaser, the fact that the purchaser was ignorant of his fraud was immaterial. *Thompson* v. *Barry*, 429.

Fraud as against Creditors.

4. In a suit in equity by a trustee in bankruptcy to set aside a conveyance made by the bankrupt to a third person for the benefit of the bankrupt's wife, if it appears that the purpose of the conveyance was to prevent an attachment by a creditor who recently had obtained a judgment, a decree ordering a release of the conveyance may be warranted, although there is no direct evidence that the specific purpose of the conveyance was known at the time to the person to whom the conveyance was made. *Gray* v. *Chase*, 444.
5. In a suit in equity by a trustee in bankruptcy to set aside a conveyance by the bankrupt through a third person to his wife, the case for some reason not appearing on the record was sent to an auditor instead of a master. The auditor found that there was no evidence that the conveyance in question was made or accepted with any fraudulent intent or for the purpose of delaying or hindering creditors. It appeared by the auditor's report that when the conveyance was made the bankrupt was insolvent and heavily indebted and that the conveyance was without consideration. In the Superior Court the judge reached a conclusion opposite to that of the auditor and found that the conveyance was fraudulent as against creditors. *Held*, that on the facts reported this court could not say that the finding of the judge was wrong. *Ibid.*

For what defendants must account.

6. In a suit in equity by a trustee in bankruptcy to set aside a conveyance of an equity of redemption made by the bankrupt to a third person for the benefit of the bankrupt's wife, if it appears, that the conveyance was made without consideration in order to prevent an attachment of the property by a creditor of the bankrupt, and that the grantee made a paper in the nature of a lease to the bankrupt's wife, who continued to occupy the premises as she did before, paying interest on the mortgages, taxes and other expenses but no rent, the grantee may be held to account for the amount which he should have received as rent, and the bankrupt's wife also may be charged with the rent which she should have paid, having by the adjudication in bankruptcy become a tenant at sufferance of the trustee in whom the title to the property then vested. *Ibid.*

To set aside Contract void for Champerty.

7. This court has jurisdiction in equity to set aside a contract void for champerty. *Gargano* v. *Pope*, 571.
8. A client who has made with his attorney a contract in writing void for

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champerty is not barred as one *in pari delicto* from maintaining a suit in equity to set aside the contract. *Gargano* v. *Pope*, 571.

9. The rule that one must come into equity with clean hands does not apply to a client bringing a suit in equity against his attorney to set aside as void for champerty a contract in writing to which the plaintiff is a party. *Ibid.*

Specific Performance.

10. The right of a vendee to enforce specifically a contract for the sale of land, by compelling a conveyance, is not affected by the fact that the vendor's title was imperfect when the contract was made, if later it became adequate. *Harriman* v. *Tyndale*, 534.

Charge on Proceeds of Land.

11. It is not within the power of an administrator *de bonis non* with the will annexed of an insolvent estate, to stipulate that an arbitrator under R. L. c. 194, may award damages on a claim against the estate for the conveyance of certain real estate as a preferred claim under R. L. c. 142, § 30, but if the real estate in question has been turned into money by an agreement of the parties, with a stipulation that the claim shall be paid from the fund, the fund properly is chargeable in equity with the damages which are allowed. *Harriman* v. *Tyndale*, 534.

For suit by assignee of rights under life insurance policy, see INSURANCE, 8.

Bill by stockholder to enforce rights of corporation must show submission of facts to directors, see CORPORATION, 1.

Suit to restrain continuing interference with right of passage over private road, see WAY, 1.

Suit under R. L. c. 112, § 100, to enforce order of selectmen as to performance of condition in grant of location to street railway company, see STREET RAILWAY, 7.

In suit under R. L. c. 112, § 100, financial inability of street railway to carry out order of selectmen immaterial, see STREET RAILWAY, 5.

EQUITY PLEADING AND PRACTICE.

Objection of Remedy at Law.

1. An objection to a bill in equity, that the plaintiff has a plain and adequate remedy at law, is waived by proceeding without objection in a hearing on the merits before a master. *Driscoll* v. *Smith*, 221.

Parties.

Under R. L. c. 112, § 100, selectmen proper plaintiffs to enforce order of selectmen as to street railway, see STREET RAILWAY, 3.

Appeal.

2. In a suit in equity, where the defendants have appealed from a decree ordering them to account to the plaintiff for certain money claimed by

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him, and the plaintiff has not appealed, it is not open to the plaintiff to dispute credits allowed to the defendants by the decree. *Gray* v. *Chase*, 444.

Findings of Fact.

3. Findings of fact by a judge sitting in equity will not be reversed on appeal unless plainly wrong. *Skehill* v. *Abbott*, 145.

Suggestion of Death.

4. In a suit in equity by a trustee in bankruptcy to set aside conveyances in fraud of creditors made by the bankrupt through a third person to his wife, and to a third person for his wife's benefit, the suggestion of the death of the bankrupt filed in the case by his widow, one of the defendants, without further proceedings based upon it, does not bring before the court a claim of dower in the property in question. *Gray* v. *Chase*, 444.

Decree.

5. In a suit in equity a decree may be made that each of two wrongdoers shall pay to the plaintiff the amount due to him by reason of the wrongful act in which they both took part, and in such case a payment by one discharges the other. *Gray* v. *Chase*, 444.

6. Under the bankruptcy act of 1898, § 70 *a*, the property of a bankrupt vests in the trustee from the date of the adjudication in bankruptcy. In a suit by a trustee in bankruptcy an accounting was ordered as to property of the bankrupt found to have been conveyed in fraud of creditors. The decree directed that the accounting should begin on a certain day, which was two days earlier than the date stated in the auditor's report as that of the adjudication in bankruptcy. *Held*, that while there might be an error of fact, the record did not disclose sufficient facts to show an error in law, or to enable the court to correct any error of fact. *Ibid.*

ESTOPPEL.

One who sells as guardian estopped to set up adverse title in himself, see GUARDIAN, 2.

One giving deed of land bounding on private road over his own land estopped to deny existence of road, see DEED, 3.

One executing deed with name of grantee left blank not estopped from asserting title against *bona fide* mortgagee advancing money to one who obtained deed by misrepresentation and fraudulently inserted his name as grantee, see EQUITY JURISDICTION, 2.

Fraternal beneficiary association not estopped from setting up defence, that certificate was not approved by supreme medical examiner, by its delay in forwarding the certificate made possible by act of assured, see FRATERNAL BENEFICIARY ASSOCIATION, 4.

EVIDENCE.

Presumptions and Burden of Proof.

1. There is a presumption of fact that men act honestly, and when fraud is invoked it must be alleged and proved affirmatively by the party who relies upon it. *Barron* v. *International Trust Co.* 440.

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2. Where a plaintiff sues under an assignment held by him as security for a judgment, if the defendant relies on a payment of the judgment this is matter of defence which he must allege and prove. *Selleck* v. *Garland*, 596.

Burden on carrier to show certain goods inflammable within clause in bill of lading permitting such goods to be stowed on deck at owner's risk, see CARRIER, 1.

Burden on plaintiff in action for price of milk to show that milk furnished was of quality required by statute, see MILK, 2.

In absence of evidence, law of New York as to equitable restrictions presumed to be same as common law of this Commonwealth, see *post*, 19.

Judicial Notice.

Court does not take judicial notice of city ordinance, see *post*, 20.

Best and Secondary.

3. It is proper to exclude secondary evidence of the contents of letters offered by a plaintiff who has testified that they were written to him by the defendant, and who successively has testified that the letters "might be lost, he did not know", that he had not any letters and that "we did not bring the letters here", and where there has been no attempt to show that any search was made for the letters or that they were lost. *Post* v. *Leland*, 601.

4. Where in an action against a city it was competent for the plaintiff to show that the income of the water department of the defendant exceeded the expenses of that department, oral evidence of this fact was introduced. The defendant objected to this evidence on the ground that an ordinance of the defendant required records to be kept by each department of the city, and accounts to be kept of the money expended. The ordinance was not proved, and the court did not consider the question whether, if properly attested and put in evidence, the ordinance would have rendered the oral testimony inadmissible as not the best evidence. *O'Brien* v. *Woburn*, 593.

5. Where secondary evidence is admissible of a lost deed executed in 1827, conveying land then in the State of Rhode Island, a copy of the deed from a registry in this Commonwealth, where it was recorded by mistake in 1828, may be admitted in connection with other facts as evidence of the execution and delivery of the deed, the registry in which the deed was recorded having become by a statute of 1862 the place where the record of all deeds of the land in question should be found. *Phillips* v. *Watuppa Reservoir Co.* 404.

As to admission by party of matter of record, see PRACTICE, CIVIL, 6.

As to proof by officer of lawful attachment in answer to alleged conversion of goods sold by him on execution, by return of execution into court, see EXECUTION.

Relevancy and Materiality.

Previous negligence of plaintiff immaterial on question of his due care, see NEGLIGENCE, 1.

Of defendant's book of rules on question of negligence of defendant's employee, see NEGLIGENCE, 28.

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Materiality of evidence as to due care of plaintiff and negligence of defendant in action by car inspector against railroad company for injury in freight yard, see NEGLIGENCE, 13, 14.

Use of article after expiration of period of trial evidence of election to buy, see SALE, 1.

Certain evidence not relevant on issue of fictitious bidding at auction, see INSOLVENCY, 2.

Deed improperly recorded admissible to show nature of use of one claiming by prescription, see EASEMENT.

Award of special commission appointed under R. L. c. 111, §§ 136, 137, material in hearing of petition of railroad company for damages from alteration of highway crossing, see RAILROAD, 1.

Competency.

6. On the question whether monthly payments made by a son to his mother, for which the mother gave receipts in writing, were payments upon a note of the son held by the mother or were gifts, the son and mother both being deceased at the time of the trial, a witness was allowed to testify without objection that the mother, after the death of the son, refused to accept from the administrator of the son's estate the balance of the note after deducting such payments, on the ground that she understood that the payments of the son were gifts to her. *Held*, that although this evidence of the understanding of the mother could not have been admitted if objected to, yet having been admitted without objection it became evidence to be considered by the jury. *In this case*, however, there was independent evidence of declarations of the mother that the money paid by her son was a present, that she had settled with him, and that she was not indebted to him at all. *Brightman* v. *Buffington*, 401.

Witness cannot testify that he did not understand what was meant by word "bought" in notice from broker, see WAGERING CONTRACTS, 8.

Evidence competent for defendant on question whether he had reasonable cause to believe that plaintiff was carrying on wagering contract, see WAGERING CONTRACTS, 9.

Conduct of parties when admissible to show their construction of contract, see LANDLORD AND TENANT, 2.

To show defendants to have been partners of certain firm, letters issued and written in usual course of business, representing them as members of the partnership, admissible, see PARTNERSHIP, 1.

Of certain evidence of existence and extent of private road, see WAY, 2, 3.

Of certain evidence in action against officer for accepting insufficient sureties, see OFFICER, 2, 3.

Evidence of use of trap door in floor of mill as passageway not evidence of invitation unless known to proprietor, see NEGLIGENCE, 45.

Collateral Issues: Remoteness.

As to limit of time from execution of will in relation to which evidence of testator's mental condition shall be admitted, see WILL, 1.

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As to evidence, on issue of plaintiff's due care, of custom of other workmen in similar situation, see NEGLIGENCE, 38.

Evidence of working of other appliances like that which caused accident, inadmissible, see NEGLIGENCE, 17.

On question of amount to be paid by Commonwealth to town of Danvers for use of water furnished to Danvers lunatic hospital under contract in writing, evidence of sums paid for water at State prison and in other towns rightly excluded, see WATERWORKS, 2.

Opinion: Experts.

Conclusion of fact.

7. In an action for the construction and installation of an elevator in a building, which after the installation had been totally destroyed by fire, it appeared that the defendant before the fire, although he had used the elevator, had refused to pay for it because it did not conform to the contract in every detail, and after the fire contended that the title to the elevator had not passed to him. The defendant was asked by his counsel whether the elevator ever was approved by him. The question was excluded. *Held*, that the exclusion was right, as the question depended upon inferences to be drawn from the facts in evidence and called for the defendant's conclusion on the issue to be submitted to the jury. *Plunger Elevator Co.* v. *Day*, 130.

Issue of soundness of mind.

8. On the issue of the soundness of mind of a testator, a witness not an expert cannot be asked the question "From these facts what did you infer in your own mind as to Mr. J.'s [the testator's] mental capacity?" *McCoy* v. *Jordan*, 575.

9. On the issue of the soundness of mind of a testator, a witness not an expert cannot be allowed to testify that the testator's "powers seemed to be complete and perfect" nor that so far as the witness remembered each time he saw the testator he "should say that he was in the possession of clear faculties and mental powers." *Ibid.*

10. On the issue of the soundness of mind of a testator a witness not an expert can be asked whether he noticed any failure of memory and whether he ever noticed anything to indicate that the testator was not of sound mind. Such a witness also may be asked whether he noticed any failure of intelligence on the part of the testator and whether the testator's memory was good or bad, if the questions are limited by the judge to observations of external manifestations and are so answered. *Ibid.*

Qualification of expert.

11. A witness who has been a contractor and builder for fourteen years, but who never has made a study of the bearing strength of wood, may be found not to be qualified as an expert to testify to the weight which would be borne by a spruce plank twenty feet long, twelve inches wide and two inches thick, with a knot as large as the palm of a man's hand in the middle of it. *Thompson* v. *Worcester*, 354.

Qualification of expert as to fair market value of land, see *post*, 13.

Evidence of expert as to improper support of one corner of certain staging

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held admissible, although question did not contain statement as to whole construction of staging, see NEGLIGENCE, 37.

Of Value of Real Estate.

12. In order to show the value of certain land evidence of a sale of other land may be admitted but not of the value or the assessed valuation of the other land. *Sirk* v. *Emery*, 22.

13. On a petition for the assessment of damages for land taken by the metropolitan park commissioners under St. 1893, c. 407, mechanical engineers, familiar with the use of steam and water power and with mills of various kinds, but having no knowledge of the prices of land bought and sold in the vicinity of the land taken, except for manufacturing purposes, were allowed by the presiding judge to testify that the petitioner's land was well adapted for a mill site and to give their opinion of its fair market value for a particular kind of mill. There was testimony on both sides as to the value of the petitioner's land from persons familiar with the prices at which land was sold in the vicinity. *Held*, that, although the testimony of the mechanical engineers was objectionable and it would have been a better exercise of judicial discretion to have excluded it, the court could not say that there was no evidence in the case on which the presiding judge might find these witnesses qualified to aid the jury in fixing the market value of the property. *Conness* v. *Commonwealth*, 541.

Extrinsic affecting Writings.

14. A seller of goods who accepts from a broker a sale note stating an absolute sale to a certain purchaser cannot show that the sale was conditional, if the broker had authority to make an absolute sale. *Finnigan* v. *Shaw*, 112.

Evidence inadmissible to vary note by adding condition, see BILLS AND NOTES, 3.

Oral evidence admissible to identify property described in officer's return, see OFFICER, 2.

Oral agreement between partners, without consideration as new undertaking, admissible to show meaning of term "expenses" in previous memorandum in writing, see PARTNERSHIP, 4.

Evidence showing knowledge of testator that his property was diminishing and his doubt as to whether it would be sufficient to carry out provisions of his will, admissible as bearing on his intention that certain legacies in codicil should be in substitution for those given to same persons by his will, and not cumulative, see DEVISE AND LEGACY, 6.

Admissions and Confessions.

15. A failure to reply to a statement which if true calls for denial is evidence that the person maintaining silence admitted the truth of the statement. *Sumner* v. *Gardiner*, 433.

16. Whether a confession was voluntary is primarily a question for the presiding judge, who, if he admits the evidence, must submit the question finally to the jury. *Commonwealth* v. *Antaya*, 326.

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17. In a trial for larceny the judge admitted a confession made by the defendant at a police station. Subsequently it appeared that after a part of the conversation in which the confession was made had taken place, a police officer present told the defendant that "it would be better for him and all concerned to tell the truth." The government witnesses testified that this remark was after the confession. The defendant testified that it was before parts of the confession had been made. The defendant asked to have the whole confession excluded. The judge instructed the jury not to consider any of the conversation which they found to be subsequent to the officer's remark. In this court the defendant contended, that it was the duty of the judge to pass upon the confession as a whole, and not to leave the question of the dividing line to the jury. *Held*, that, even if this point, which seemed not to have been taken at the trial, was open to the defendant, the fair inference was that on the preliminary question of admission the judge had found that the whole confession was made before the officer's remark, and that the submission of the question finally to the jury was in accordance with the established practice. *Commonwealth* v. *Antaya*, 326.

18. It is no ground for excluding a confession that immaterial parts of the conversation in which the confession occurred may have been omitted from the evidence. *Ibid.*

Admission of matter of record, see PRACTICE, CIVIL, 6.

Proof of Foreign Law.

19. In the absence of evidence on the subject, it will be presumed that the law of the State of New York as to equitable restrictions on land is the same as the common law of this Commonwealth. *Hazen* v. *Mathews*, 388.

Proof of City Ordinance.

20. The court cannot take judicial cognizance of a city ordinance. *O'Brien* v. *Woburn*, 598.

21. By St. 1889, c. 387, § 1, (R. L. c. 175, § 73,) a city ordinance cannot be admitted in evidence unless it is attested by the city clerk. *Ibid.*

Photographs, Other Crimes.

22. On the trial of an indictment under R. L. c. 208, § 10, for burning an insured building with intent to injure the insurer, photographs representing the building that was burned, after having been verified properly, may be admitted in evidence, although they also show another building belonging to the defendant that had been partially destroyed by fire at a time previous to the burning charged, there being no evidence relating to the circumstances of the previous fire and the presiding judge having instructed the jury "that no inferences were to be drawn from the burning of any other building than that charged in the indictment." *Commonwealth* v. *Fielding*, 484.

Public Records, Ancient Plans.

United States coast survey chart showing existence of ancient way, admissible as public record and as ancient plan, see WAY, 6.

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To contradict Witness.

Not necessary to call attention of witness of adverse party to conversation before introducing evidence to contradict his testimony as to conversation, see WITNESS.

EXECUTION.

If, in an action against an officer for an alleged conversion of goods sold by the defendant on execution, the defendant cannot prove a lawful attachment in justification of his acts without a return of the execution into court, such a return may be made at any time before the execution is received in evidence. *Fletcher* v. *Wrighton*, 547.

EXECUTOR AND ADMINISTRATOR.

1. If a debt from an executor to his testator is due on demand, the executor cannot set up that no such demand was made or that he could not make a demand on himself. *Bassett* v. *Fidelity & Deposit Co.* 210.
2. The surety on an executor's bond is liable for the full amount due the testator from an insolvent firm of which the executor was a member, although the firm and the executor were insolvent at the time of the testator's death. *Ibid.*
3. In an action on an executor's bond, where it appears that the executor is chargeable with funds in his hands for which he negligently has failed to account, to an amount in excess of the penal sum of the bond, he and his sureties are liable for the penal sum of the bond with interest from at least the date of the writ. *Ibid.*

Under R. L. c. 141, § 24, beneficiary for life entitled to income from death of testator which fund would have earned if invested by trustee, see DEVISE AND LEGACY, 7, 8.

Where estate insolvent, no power to stipulate that arbitrator may treat certain claim as preferred under R. L. c. 142, § 30, see EQUITY JURISDICTION, 11.

Duties of, under bequest providing for certain deduction from share of one of children of testator, see DEVISE AND LEGACY, 4.

FRANKLIN FUND.

As to board of managers of, see CHARITY, 1–3.

FRATERNAL BENEFICIARY ASSOCIATION.

1. If the holder of a certificate of a fraternal beneficiary association is entitled to an indemnity of a definite sum of money under the terms of his certificate payable out of a disability assessment levied upon the members of the association, he may recover the amount in an action of contract against the association for a breach of its implied agreement to levy the assessment. *Garcelon* v. *Commercial Travelers' Eastern Accident Association*, 8.

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2. In an action against a fraternal beneficiary association for a failure to levy a disability assessment out of which an indemnity is payable to a member under the terms of his certificate of membership, the cause of action is a breach of contract, and allegations in the declaration as to bad faith, fraudulent purpose and unlawful action on the part of the defendant do not make it a declaration in tort or in contract or tort. *Garcelon* v. *Commercial Travelers' Eastern Accident Association*, 8.

3. The amputation of an arm about four inches below the elbow is the loss of an arm within the meaning of a certificate of a fraternal beneficiary association agreeing to indemnify the holder for such a disability. *Ibid.*

4. The rules of a beneficiary association required a member applying for reinstatement, after a suspension of more than thirty and less than ninety days, to pay all arrearages and a reinstatement fee, and to "furnish the branch, the medical examiner's certificate as prescribed for persons on original application." The rules for original application required the medical examiner's certificate to be made upon a certain form and to be transmitted sealed to the supreme medical examiner whose approval was required. A member thus suspended paid all arrears and the reinstatement fee, and was examined by a local medical examiner, who made a certificate upon the prescribed form, but, instead of sealing it and transmitting it to the supreme medical examiner, gave it to the member, who delivered it to the branch. The certificate was not received by the supreme medical examiner until after the death of the member, and was never approved by that examiner. *Held*, that the medical examiner's certificate to be furnished the branch as a condition of reinstatement was a certificate approved by the supreme medical examiner; therefore, that the member at the time of his death was not in good standing, and his administrator could not recover on a certificate which made the association liable only upon proof of the member's death in good standing in the order. *Held, also*, that the association was not estopped by delay in forwarding the certificate from setting up this defence, as the possibility of the delay came from the intestate's own act in receiving the certificate and giving it to the local branch. *McLaughlin* v. *Catholic Knights of America*, 298.

5. Upon the death of a member of a fraternal benefit association, who was suspended for failure to pay dues and assessments and was not reinstated at the time of his death, his administrator cannot recover from the association the sums paid as assessments by the intestate before his suspension. *Ibid.*

FRAUD.

Must be proved affirmatively to overcome presumption of honesty, see EVIDENCE, 1.

Equity jurisdiction in case of fraud, see EQUITY JURISDICTION, 2–6.

FRAUDULENT CONVEYANCE.

As to suit in equity by trustee in bankruptcy to set aside fraudulent conveyance by bankrupt, see EQUITY JURISDICTION, 4–6.

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GRADE CROSSING ACT.

1. Where the report of commissioners appointed under St. 1890, c. 428, on a petition to abolish certain grade crossings, requires a new location of a railroad passenger station at a point thirteen hundred feet from the old station, and the new station is constructed by the railroad company practically of the same size as the old one at a cost which an auditor finds to be fair and reasonable, the railroad company is entitled to be allowed the cost of the new station as part of the cost of the alterations and should not be restricted to the actual cost of reproducing the old station. In such a case the railroad company cannot be compelled to account for the value of land owned by it in fee on which the old station stands and which after the alterations is used by the railroad company for freight purposes. *Westborough, petitioner*, 107.

2. In proceedings under St. 1890, c. 428, for the abolition of certain grade crossings in a town, the town is not entitled to be allowed as part of the cost of the alterations a sum paid in settlement of land damages which were barred by the limitation of the act, the town having no right to waive the statutory bar as against the railroad company and the Commonwealth, even if it might do so for itself. *Ibid.*

3. In proceedings under St. 1890, c. 428, for the abolition of certain grade crossings in a town, the town is not entitled to be allowed as part of the cost of the alterations the amount of expenses incurred by it for counsel and expert witness fees in disputing the allowance of certain items in the account presented by the railroad company and disallowed by the auditor in that account. *Ibid.*

GREAT POND.

In an action for an alleged trespass in maintaining an ice run, over land leased to the plaintiff covered with water and adjoining a great pond whose limits had been extended artificially, it was *held* that the conflicting evidence in the case warranted a finding that the line of the pond as it originally existed adjoined land to which the defendant's lessor had acquired title by prescription, and that a verdict for the defendant was justified. *Frazer* v. *Fuller*, 499.

GUARDIAN.

1. A guardian cannot maintain in his own name an action of tort for false representations whereby his ward suffered damage. The fact that since the bringing of the action the ward has died and the plaintiff has inherited his property is immaterial. *Brock* v. *Rogers*, 545.

2. One, who by leave of court sells and conveys as guardian land standing in the name of his ward is estopped to set up an adverse title to the land in himself. *Ibid.*

HOLIDAY.

Judge may give further instructions to jury on legal holiday, see PRACTICE, CIVIL, 3.

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HOMICIDE.

1. Under R. L. c. 218, Schedule of Forms, Murder, a grand jury is authorized to present an indictment for murder in the second degree, St. 1899, c. 409, having changed the pre-existing law in this respect. *Commonwealth* v. *Ibrahim*, 255.
2. The trial of an indictment for murder in the second degree is not a capital case, and may be held before one justice of the Superior Court. *Ibid.*

HUSBAND AND WIFE.

1. Although after an appeal from a decree of the Probate Court, under Pub. Sts. c. 147, § 33, ordering a husband to provide separate maintenance for his wife, the case is still pending in the Probate Court for such further proceedings as may become necessary, yet if the Superior Court on such an appeal orders certain monthly payments to be made by the husband "to continue until the further order of this court," the Superior Court retains jurisdiction to enforce its decree by contempt proceedings. *Smith* v. *Smith*, 394.
2. An appeal to the Superior Court from a decree of the Probate Court, declaring that the petitioner is living apart from her husband for justifiable cause and ordering that he be prohibited from imposing any restraint upon her personal liberty until further order of the court, does not abate on the death of the wife, testate, there being under R. L. c. 153, § 36, a question of property in regard to the husband's right to waive the provisions of his wife's will which must be disposed of by the Superior Court on the appeal. *Rice* v. *Rice*, 488.

INFANT.

1. An infant may avoid a contract of life insurance and recover the money paid by him as premiums, however reasonable and prudent it may have been for him to take out the policy. *Simpson* v. *Prudential Ins. Co. of America*, 348.
2. In this Commonwealth an infant in order to avoid a contract is not obliged to put the other party *in statu quo*. Thus an infant may recover money paid by him as premiums under a policy of life insurance without any deduction for the expense incurred by the insurer in keeping the policy in force. *Ibid.*
3. If, for an infant to avoid a contract of life insurance, the bringing of an action for the premiums paid under the policy is not in itself sufficient rescission and demand, notice of rescission and demand for the premiums through an attorney appointed by the infant are good, at any rate until avoided by him. *Ibid.*

INSOLVENCY.

Assignee's Sale.

1. A sale at auction by an assignee in insolvency of property of the insolvent estate is not voidable on the ground that the price was enhanced by means

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of fictitious bids agreed upon by certain creditors, if the alleged fraud was not known to the assignee, and, for aught that appears, each of the bids alleged to be fictitious might have been enforced against the bidder had it been the highest. *Rowley* v. *D'Arcy*, 550.

2. Where a purchaser, at an auction sale by an assignee in insolvency, seeks to avoid his purchase on the ground that certain creditors fraudulently increased the price by fictitious bids, he cannot introduce evidence that the assignee before the sale proposed that he, controlling the auction sale, should sell the property to the purchaser at a nominal price, if the purchaser would make an additional payment for the benefit of the assignee and certain creditors. *Ibid.*
3. A sale by an assignee in insolvency of property of which the assignee has the title, openly offered for sale and sold to the highest bidder at a time and place duly appointed and announced, is a sale by auction, although some of the creditors of the insolvent retired from the room for consultation between their bids and a period of four hours elapsed between the times of putting up and selling the property. *Ibid.*

INSURANCE.

Fire.

1. In determining the amount of a partial loss by fire under a policy in the Massachusetts standard form, issued after the enactment of the building laws of Boston, on a building in that city erected before those laws were passed, the increased cost of repairing the building by reason of the building laws may be considered. *Hewins* v. *London Assurance Corp.* 177.
2. The provision in the Massachusetts standard form of fire insurance policy that in case of a partial loss the insurer may "replace the property with other of the same kind and goodness," in a policy issued on a building in Boston after the enactment of the building laws of that city, must be held to apply only to repairs in which replacement with materials of the same kind and goodness would be lawful. *Ibid.*
3. A policy issued by a foreign fire insurance company, on a building in Boston erected before the enactment of the building laws of that city, provided that the loss or damage should in no event exceed what it would cost the insured to repair or replace the property with material of like kind and quality, and also provided that the insurer should not be liable beyond the actual value destroyed by fire for loss occasioned by ordinance or law regulating construction or repair of buildings. The building laws were in force when the policy was issued. *Held*, that in determining the amount of a partial loss by fire under this policy, the loss was to be estimated as if there were no building laws. *Ibid.*
4. The provision of St. 1894, c. 522, § 60, that no fire insurance company shall issue policies on property in this Commonwealth, other than those in the standard form, except as therein provided, and § 105 of the same statute, imposing a fine for issuing a policy in violation of § 60, and providing that the policy shall nevertheless be binding upon the company issuing it,

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do not change the legal effect of a policy issued in violation of the statute, and a policy so issued must be construed as it reads and not as if it were in the standard form. *Hewins* v. *London Assurance Corp.* 177.

5. A rider on a policy of fire insurance in the Massachusetts standard form contained the following provision: "It is understood and agreed that the Automatic Sprinkler System is in complete working order and in further consideration of reduction in rate it is hereby made a condition of this policy that the assured shall use due diligence that such equipment shall continue to be maintained in complete working order during the full term of this insurance." *Held*, that this stipulation was neither a warranty nor a condition precedent, but was a representation, a breach of which would be a matter of defence to be shown by the insurance company. *Fuller* v. *New York Fire Ins. Co.* 12.

6. A rider attached to a policy insuring goods against fire provided that the goods might be removed to a designated storehouse in a certain town reached by railroad, and stipulated that during removal the policy was to "attach in each location in proportion as the value in each bears to the value in all, and after removal in new location only." A fire occurred during removal by which some of the goods were destroyed while in railroad cars at the town of their destination but before being unloaded or taken to the designated storehouse. *Held*, that the goods on the cars were not covered by the insurance. *Goodhue* v. *Hartford Fire Ins. Co.* 41.

7. A temporary contract of insurance called a "binder", to continue by its terms only until a policy delivered to the insurer for modification has been returned to the assured, cannot affect the rights of the parties as to a loss by fire occurring after the policy has been returned. *Ibid.*

Rights in policy assignable only with consent of insurer, where loss occurs after holder has been adjudicated a bankrupt and before appointment of trustee, pass to trustee when appointed, see BANKRUPTCY, 3, 4.

Life.

8. The holder of an insurance policy, entitling him to a sickness indemnity of $35 a month and $100 for funeral expenses to be paid to his estate, signed an order to the insurance company directing the company to pay all money due on account of his policy to a certain creditor, and surrendered his policy to the company. Two days later, and before the company had acted on the order, the insured died intestate, without heirs or next of kin and with no creditors other than the payee of the order. The company refused to substitute the creditor as beneficiary under the policy, and the creditor brought a bill in equity to compel it to do so. *Held*, that the plaintiff was entitled to no relief, there being no privity between him and the company, and that his proper remedy would have been to have had an administrator appointed to collect the money on the policy. *O'Brien* v. *Continental Casualty Co.* 584.

Avoidance by infant of contract of life insurance, see INFANT, 1–3.

Against Liability.

9. A provision, in a policy of insurance against liability to persons injured by the operation of the business of the assured, that the assured upon the

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occurrence of an accident shall give immediate notice thereof in writing, is not complied with by a notice in writing mailed twenty-three days after the accident and twenty-two days after it was known to the assured. *Rooney* v. *Maryland Casualty Co.* 26.

10. If the assured, under a policy of insurance against liability to persons injured by the operation of his business, gives notice in writing of an accident for which he is liable, too late to comply with a condition of the policy requiring immediate notice, and if the notice is addressed to and received by the attorneys of the insurance company who investigate the circumstances of the accident and unsuccessfully try to settle for a small sum with the person injured and ask the assured for a written report of the accident which they receive, and if thereafter they send the notice of the accident to the insurance company which on the next day instructs them to disclaim liability, these facts are no evidence of a waiver on the part of the insurance company of the breach of the condition in the policy requiring immediate notice in writing of the accident, and no evidence of any loss or injury to which the assured was subjected by the course pursued in behalf of the company. *Ibid.*

INTEREST.

On an award by commissioners appointed under a statute, to determine the amount to be paid by the Commonwealth to a certain town for the use of water annually during a period named, under a contract between the Commonwealth and the town, the Commonwealth was held to be liable for interest from the end of each year covered by the award. *Selectmen of Danvers* v. *Commonwealth*, 502.

For purpose of determining amount to be deducted from certain legacy, interest on notes computed only to death of testator, to show debt to him at that time, see DEVISE AND LEGACY, 4.

Computation of income to be paid to beneficiary for life, see DEVISE AND LEGACY, 7, 8.

In action on poor debtor's recognizance, see POOR DEBTOR, 6.

JURISDICTION.

As to enforcing decree of Superior Court on appeal from decree of Probate Court for separate maintenance, see HUSBAND AND WIFE, 1.

Probate Court no jurisdiction over question whether appointment by will under power has been revoked by marriage, see WILL, 3.

LANDLORD AND TENANT.

1. An agreement in writing under seal for the sale of land, in which no time for performance is specified, giving the purchaser the right to possession and the "use and benefits, profits, income and general rights in said estate", providing that the vendor shall not commit waste or use the property or lease or sell any part of it without the consent of the purchaser,

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and that the agreement shall be binding upon the heirs, executors, administrators or assigns of each party, and providing also that the purchase money shall include interest on the amount named and taxes, water rates and repairs, is a present grant to the purchaser of the possession of the premises to continue until lost by his default or by the expiration or annulment of the agreement by lapse of reasonable time or otherwise, and gives the purchaser the right to lease the premises to another. *Fitch* v. *Windram*, 68.

2. A lease of real estate, under which the lessee was not bound to pay the taxes, gave the lessee an option and right to a further term of five years on giving written notice at least one year before the expiration of the first term, and within thirty days executing a written lease for the additional term, with a provision that in case of such extension the lessee should pay the taxes during the additional term. More than a year before the expiration of the first term the parties executed on the back of the lease an agreement under seal for its extension for the term of five years and eight months from the date of its expiration. The agreement of extension referred to two agreements in writing between the parties by which the lessee surrendered a part of the premises and the rent was to abate proportionally and in case the lessee should exercise the option of continuing the lease for an additional five years, he was released from paying taxes on the surrendered portion of the property. After the expiration of the original term the lessor made bills to the lessee for taxes, with the abatement agreed upon for the released portion of the premises. These bills were paid by the lessee without question for six years, including the period of extension and an additional period of occupation. Thereafter the lessee brought an action to recover the amount of taxes paid, alleging that the payments were made by mistake. *Held*, that there was evidence on which a jury could find that the plaintiff had exercised his option to have an extension of the lease and was bound by its terms to pay the taxes, except as abated by agreement of the parties; that the requirement of a notice in writing was for the benefit of the defendant and could be waived by him, and, moreover, the time for giving the notice had not arrived when the agreement of extension was executed; and that the fact that the parties made the extension run for eight months longer than five years showed merely a modification of the terms of extension which the parties might agree to; *also*, that, if there was uncertainty as to the meaning of the several writings taken together and applied to the situation and the circumstances of the parties, the construction put upon them by the parties as shown by their conduct might be considered and was important evidence. *Wood* v. *Edison Electric Illuminating Co.* 523.

When lessee of grantee under fraudulent conveyance is tenant at sufferance of grantor's trustee in bankruptcy, see EQUITY JURISDICTION, 6.

LARCENY.

For cross references, see EMBEZZLEMENT.

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LIBEL AND SLANDER.

See SLANDER.

LICENSE COMMISSIONER.

Obligation of city to pay compensation to, see MUNICIPAL CORPORATIONS, 1.

LIMITATIONS, STATUTE OF.

Sum paid by town in settlement of claim barred by statute not allowed as part of cost of alterations under grade crossing act, see GRADE CROSSING ACT, 2.

LOTTERY.

1. The provision of R. L. c. 214, § 8, that whoever "knowingly suffers money or other property to be raffled for" in a house, shop or building controlled by him, "or to be won there by throwing or using dice or by any other game of chance" shall be punished as therein provided, describes only one offence. *Commonwealth* v. *Coleman*, 198.

2. A complaint under R. L. c. 214, § 8, charging that the defendant at Northfield "in a building occupied by him and under his control, to wit, the hotel building known as the Loveland House, knowingly did suffer a certain turkey to be raffled for and to be won by throwing dice" sufficiently designates the place where the offence is alleged to have been committed. *Ibid.*

3. A complaint under R. L. c. 214, § 8, charging the defendant with suffering a turkey to be raffled for and to be won by throwing dice in a certain building occupied by the defendant and under his control, need not set forth the names of the persons permitted to raffle for the turkey or the name of the person who was suffered to win it by throwing dice. *Ibid.*

4. R. L. c. 214, § 8, providing a punishment for one who "in a house, shop or building owned or occupied by him or under his control" knowingly suffers money or other property to be raffled for or to be won there by throwing dice or any other game of chance, applies to one who occupies and controls a part of a building where he suffers the prohibited acts to be done. *Ibid.*

5. Under R. L. c. 214, § 28, providing that on a complaint or indictment for violation of any law relative to lotteries or any form of gaming no variance shall be deemed material if the complaint or indictment is sufficient to enable the defendant to understand the charge and to prepare his defence, a complaint will not be held insufficient for failing to aver that the defendant's occupation and control of a certain hotel building, in which a raffle for a turkey was alleged to have occurred, did not include one small room on the ground floor let to another person, nor will such a complaint be held to be insufficient in using the word "turkey" to describe a dead turkey. *Ibid.*

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6. Article 12 of the Declaration of Rights, securing to an accused person the right to have his crime or offence "fully and plainly, substantially and formally, described to him" is not violated by R. L. c. 214, § 28, providing that no complaint or indictment for violation of any law relative to lotteries or any form of gaming shall be held insufficient, if it is sufficient to enable the defendant to understand the charge and to prepare his defence. *Commonwealth* v. *Coleman*, 198.

MANDAMUS.

A writ of mandamus will not be granted to enforce a right given by statute for which an adequate and effectual remedy in equity is provided by statute. *Selectmen of Gardner* v. *Templeton Street Railway*, 294.

MASTER AND SERVANT.

1. If the owner of a building leased to another retains an office in it, furnishes materials for keeping the building in order, and hires, pays and directs an "all round" man employed to do general repairs in the building, and if the owner goes to the basement of the building where this man is at work and orders him to empty certain varnish from a leaking barrel into other receptacles, and the man in doing this work is injured, the relation of master and servant may be found to have existed between the two at the time of the injury. *Vallie* v. *Hall*, 358.

2. A master is liable for the acts of his servant done recklessly or wilfully in the course of the servant's employment. *Aiken* v. *Holyoke Street Railway*, 269.

Cases relating to master's liability to third person for negligence of servant, and his liability to servant for injuries received in his employ, will be found under the various sub-titles of NEGLIGENCE.

METROPOLITAN WATER SUPPLY ACT.

1. Under St. 1895, c. 488, § 14, the owner of real estate injured by the taking of the waters of the Nashua River is not entitled to compensation for damage to business, unless the real estate is situated in West Boylston, or in the part of Boylston or the part of Clinton described in that section. The provision of that section, that the commissioners appointed thereunder "shall determine the damage to and value of real estate, machinery and business," contemplates the determination of damage to business only in cases where such damage is provided for by the statute. *Nashua River Paper Co.* v. *Commonwealth*, 279.

2. Under St. 1895, c. 488, § 14, which provides compensation for the owners of real estate situated between certain lines in the town of Clinton, which is directly or indirectly decreased in value by that act or the doings of the metropolitan water board, the owner of real estate lying partly within and partly outside of the described territory can recover for indirect damage only to that part of his property which is within the designated boundaries. *McNamara* v. *Commonwealth*, 304.

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3. Under those portions of St. 1895, c. 488, which provide compensation for damage caused directly by the doings of the metropolitan water board, the draining of a well by the acts of the board is a special and peculiar damage for which a landowner is entitled to compensation whether his land is taken or not. *McNamara* v. *Commonwealth*, 304.
4. Under St. 1895, c. 488, § 15, providing that the metropolitan water board, upon agreement or determination of damages, shall notify the landowner that they will pay the damages, "or, in case the petitioner offers to make surrender, if they so prefer, they will pay the value so agreed upon or determined", the water board, on an offer of a petitioner to surrender his land and a determination of its value by the commissioners, may elect either to take the land or to pay the damages. *Ibid.*

MILK.

1. A contract to sell milk means a contract to sell milk of the standard quality required by R. L. c. 56, § 56. *Copeland* v. *Boston Dairy Co.* 207.
2. In an action for the price of milk the burden is on the plaintiff to prove that the milk furnished by him was of the standard quality required by R. L. c. 56, § 56. *Ibid.*

MORTGAGE.

Construction of contract to advance money on mortgage, see CONTRACT, 12. Attachment of mortgaged goods, see ATTACHMENT.

MUNICIPAL CORPORATIONS.

1. A city, appointing a license commissioner under St. 1894, c. 428, does not employ him, and incurs no obligation to pay a reasonable compensation for his services. Its only obligation in regard to his compensation is imposed by § 6 of that statute, which requires each city to pay its license commissioners such salaries as the city council shall establish. *Cook* v. *Springfield*, 247.
2. An order from the proper authorities to widen a public way, making it the duty of a city or town to perform the work of construction, gives no authority to the surveyor of highways or any municipal officer to perform the work or to make any contract for its performance without a vote of the city or town. *Wormstead* v. *Lynn*, 425.
3. In order that a practice or custom adopted by a town or city should give authority to an officer to make contracts in its behalf, the adoption of the practice or custom must have been by a vote of the town or city. *Ibid.*
4. Where a person enters into a contract with a public officer, who undertakes to act for and to bind a municipal corporation, he is bound at his peril to ascertain the extent of the authority of the public officer with whom he deals. *Ibid.*
5. A city is not liable for damage caused by the insufficiency of its system of sewers. *Manning* v. *Springfield*, 245.

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6. In an action at common law against a city for personal injuries, it is no evidence of negligence on the part of the city, that its employees engaged in laying a water main left temporarily on the sidewalk of a public street an iron pipe from one to two feet in diameter and ten or twelve feet long two or three inches from the curbstone and parallel with it. *Downey* v. *Boston*, 20.

Duty of, in furnishing materials for temporary staging, see NEGLIGENCE, 35.

Duty of, as to shade trees, see WAY, 16.

Board of aldermen of Chicopee not acting in judicial capacity in investigating granting of licenses by licensing board, see CHICOPEE, 1, 2.

Municipal license no defence to liability of telegraph company for injury from pole maintained on highway, see TELEGRAPH COMPANY, 1, 2.

Powers of selectmen as to granting locations to street railway companies and enforcing conditions of grant, see STREET RAILWAY, 3–7.

Liability for defect in highway, see WAY, 15–17.

City ordinance, how proved, see EVIDENCE, 20, 21.

NEGLIGENCE.

Contributory Negligence and Due Care.

1. On the issue of a plaintiff's due care the defendant cannot show previous acts of negligence of the plaintiff. *Aiken* v. *Holyoke Street Railway*, 269.
2. In an action for a wanton and wilful injury caused by a reckless omission of duty, it is no defence that the plaintiff failed to exercise ordinary care for his safety. *Ibid.*
3. If a boy six and one half years of age is clinging to the step at the forward end of an electric car, which is passing around a curve from one street to another, trying to get into a stable position and crying to the motorman to let him off, and the motorman, seeing and hearing the boy and knowing that he is in a place of danger, turns on the power in a wanton and reckless way, to start the car quickly at full speed, the boy, if thus thrown off and injured, may recover from the railway company for his injuries without showing that he was in the exercise of ordinary care at the time of and immediately after the motorman's reckless act. *Ibid.*

Of parent.

4. If a father allows his child three years and eight months of age to go into a yard shut in by a gate which is kept closed by a strong spring, to play with her older sister and a neighbor's daughter each about ten years of age, this is not as matter of law negligence on the part of the father, which will prevent the child from recovering from a street railway company, in an action for injuries from being run over by an electric car after the children had wandered from the yard into the streets. *Mellen* v. *Old Colony Street Railway*, 399.

Of person in charge of child.

5. In an action by a child against a street railway company for injuries from being run over by a car of the defendant, it appeared, that the plaintiff

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was three years and eight months of age and that a neighbor's daughter ten years of age asked the plaintiff's sister, a few months younger than that, to go to play, whereupon the plaintiff's father said, "You take E. [the plaintiff] with you, . . . and go right in the yard and play", the yard being shut in by a gate which was kept closed by a strong spring. After going into the yard to play, the children wandered off into the streets and the plaintiff was run over by a car of the defendant, when crossing a street on her way home. The defendant contended that there was no evidence of due care on the part of the plaintiff's sister who it contended was in charge of the plaintiff at the time of the accident. *Held*, that whether the plaintiff was under the charge of her older sister after they left the yard was at least a question for the jury, depending upon the nature of the permission given by the plaintiff's father. *Mellen* v. *Old Colony Street Railway*, 399.

Of workman bringing patterns for band saw, see *post*, 47.

Of boy knocking rags out of cylinder of duster in paper mill, see *post*, 55.

Of "all round" man causing explosion of varnish, see *post*, 48.

Of workman injured by movable steam pipe on beater in paper mill, see *post*, 43.

Of carpenter at work on temporary staging, see *post*, 36.

Of employee crossing trap door over elevator well, see *post*, 44, 46.

Of one on his way to work in factory falling down elevator well, see *post*, 31.

Of master mechanic of mill standing in driveway of mill yard near pile of heavy timber, see *post*, 30.

Of workman in stone quarry injured by slipping of large stone, see *post*, 60.

Of workman engaged in cutting tilted stone, see *post*, 52.

Of one driving over railroad crossing, see *post*, 11.

Of passenger alighting from moving train, see *post*, 8.

Of engineer in managing freight train, see *post*, 10.

Of car inspector in freight yard omitting signal required by rule which he was justified in assuming to be no longer in force, see *post*, 12, 13.

Of section hand on railroad relying on whistle required by rule not intended for his protection, see *post*, 49.

Of child crossing street railway track, see *post*, 25.

Of one walking on street railway track, see *post*, 27.

Of workman, operating stationary engine near street railway track, stepping on track, see *post*, 26.

Of woman falling over pile of stones on sidewalk, see *post*, 7.

Gross.

As to gross negligence of railroad conductor in moving, without notice, freight car in process of unloading, see *post*, 15.

As to wanton and wilful act of motorman of electric car, see *ante*, 2, 3.

Gross negligence in failing to shut off current from fallen electric light wire, and in inspector's delay in arriving after being ordered to go to place where pole was burning and wire was down, see *post*, 41.

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Proximate Cause.

Failure to stop electric car at crossing not proximate cause of plaintiff's injury in alighting at different point, see *post*, 20.

Liability for selling damaged oats impregnated with poison for use of plaintiff's horses, see SALE, 2.

Telegraph pole proximate cause of injury caused by wagon falling into depression in highway and against pole, see TELEGRAPH COMPANY, 2.

As to Licensee.

Master mechanic in mill yard not mere licensee in standing near pile of heavy timber belonging to independent contractor, see *post*, 29.

Invitation.

Use by operatives of trap door in floor of mill as passageway not evidence of invitation unless proprietor had knowledge of such use, see *post*, 45.

On Highway.

6. If the rail of an electric car track is nine feet from the curbstone of a crowded street and a woman in an open wagon drives to the side of the street for the purpose of going to a shop, and stops with her horse's head at the curb behind a team with the hind wheel of her wagon so near the car track that a car which she sees stopped at a short distance away cannot pass without striking the wheel, and the car moving slowly at a pace not faster than a walk strikes the wheel and cramps it under the wagon, the questions of the due care of the woman and the negligence of the railway company are for the jury. *Kennedy* v. *Lowell, etc. Street Railway*, 31.

7. Where paving stones had been piled along the edge of the sidewalk of a street of a city by a sewer contractor, and the street is open for travel, a woman who trips and falls over some of the stones when about to step from the sidewalk to an open electric car, looking for a seat in the car with her attention not wholly upon her footing, in actions against the city and the contractor for injuries thus caused may be found to have been in the exercise of due care, if there is evidence that the stones were hidden from her view by persons behind whom she was walking and that she did not see the stones until she fell over them. *Sampson* v. *Boston*, 46.

As to tree near street railway track, see WAY, 16.

Liability of telegraph company to one injured by post in highway, maintained in conformity with license and without negligence, see TELEGRAPH COMPANY.

On Railroad.

8. Whether a woman passenger, fifty-two years of age, with a jug of molasses in her left hand and a satchel suspended from her right arm is in the exercise of due care when falling or being thrown from a train which has stopped at a station and is started again as the passenger is on the steps of the car taking hold of the outer iron rail with her right hand in the act of alighting, is a question of fact for the jury. *Clement* v. *Boston & Maine Railroad*, 312.

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9. Whether a fireman on a passenger train, whose duty it is to receive from the conductor a signal to start the train and to convey the order to the engineer, is negligent in thinking that he sees such a signal given by the conductor, when it is not, and instructing the engineer to start the train, is a question of fact for the jury. *Clement* v. *Boston & Maine Railroad*, 312.

10. In an action under the employers' liability act against a railroad company for the death of the plaintiff's intestate, an engineer on an express freight train, killed by his train running into a construction train, it appeared, that the train under charge of the plaintiff's intestate consisted of a heavy locomotive and forty-four cars, some of them heavily loaded, that it was on a heavy down grade where it was not customary to use steam under similar circumstances but that the intestate was using steam to make up time and was running at a rate of from eighteen to twenty-five miles an hour, that the rules required him to be "vigilant and cautious, not trusting alone to signals or rules for safety", that the stationary signal nearest to the construction train was seventeen hundred and fifty feet from it, that a flagman went back from the construction train upwards of two thousand feet and beyond this signal and could have been seen for a considerable distance, that the intestate tried to stop his train but, although he checked its speed somewhat, it ran past the flagman to the place of the collision where it struck the construction train with such force as to throw the locomotive of the freight train from the track and wreck seventeen cars. *Held*, that, assuming that the flagman was a person having charge of a signal, under St. 1887, c. 270, § 1, cl. 3, and that he was negligent in not going back as far as required by the rules, and also assuming that there was negligence on the part of the defendant in omitting to warn the plaintiff's intestate of the presence of the construction train, there was no evidence that the plaintiff's intestate was in the exercise of due care. *Jones* v. *New York, etc. Railroad*, 89.

Of section hand on railroad relying on whistle required by rule not intended for his protection, see *post*, 49.

At Railroad Crossing.

11. In actions against a railroad company for personal injuries, from a collision at a grade crossing in Connecticut with an electric car operated by the defendant, it appeared, that by the law of Connecticut the electric car was required to sound a whistle and gong when approaching the crossing, that the plaintiffs were driving in a "canopy top wagon", about nine o'clock on a cloudy evening, that there were two tracks at the crossing, one used for steam cars and the other for electric cars, that the plaintiffs saw a freight train approaching and, after it had passed, drove within fifty feet of the crossing, listening for signals from an electric car which was due about that time, that, after stopping there a minute and a half or two minutes, the horse became restless and started of his own accord for the crossing, on which the smoke from the freight train had settled down, that at the crossing the plaintiffs listened for signals, and, hearing none, started to cross and were struck by the electric car going at a speed of

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about twenty-five miles an hour, that when the plaintiffs arrived at the crossing they were for the first time aware of the serious interruption to their view caused by the smoke, and that while stopping there they had reason to think that the smoke would not disappear quickly. *Held*, that, on this and other evidence, the questions whether the signals required by law were given by the defendant, whether the failure to give them contributed to the accident, and whether in approaching the crossing and attempting to cross it the plaintiffs were in the exercise of due care, were for the jury. *Dalton* v. *New York, etc. Railroad*, 344.

In Freight Yard.

12. In an action by a car inspector employed at night in a freight yard against the railroad company employing him, for injuries received while the plaintiff was at work repairing a car, from other cars being moved forcibly against it by order of the defendant's superintendent, the fact that the plaintiff had not placed a blue signal upon the car on which he was working, as required by a rule issued by the defendant, does not as matter of law constitute contributory negligence on his part, if there is evidence on which the jury can find that the defendant had acquiesced in an abandonment of the rule, and that the plaintiff, although he knew of the promulgation and assertion of the rule, properly might assume that it was no longer in force. *Brady* v. *New York, etc. Railroad*, 225.

13. In an action by a car inspector employed in a freight yard against the railroad company employing him, for injuries received while the plaintiff was at work repairing a car, from other cars being moved forcibly against it by order of the defendant's superintendent, the plaintiff may show, upon the issues of his due care and the defendant's negligence, that, three weeks before the accident, a train on which the plaintiff was at work making repairs was moved before the repairs were finished, and that the superintendent then promised the plaintiff, that thereafter he would not order any car to be moved under such circumstances until after the plaintiff had notified him that the repairs had been completed. *Ibid.*

14. In an action by a car inspector employed in a freight yard against the railroad company employing him, for injuries received while the plaintiff was at work repairing a car, from other cars being moved forcibly against it by order of the defendant's superintendent, the plaintiff, upon the issue of the negligence of the superintendent, may introduce evidence to show that under the circumstances so many cars, as were run against the one on which the plaintiff was working, could not be sent down properly with only one brakeman upon them. *Ibid.*

Evidence that yard master is superintendent and person in charge of train, see *post*, 61.

On Switch Track near Factory.

15. In an action against a railroad company for causing the death of the plaintiff's intestate, it appeared, that the plaintiff was in the employ of the proprietor of a factory and was engaged in unloading merchandise from a car, standing on a switch track near the factory, into a chute in

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the factory connected with the car by a steel "brow" four and one half feet long, three feet wide and one quarter of an inch thick, that the intestate was told by the conductor of the switching crew to "look out" because cars were to be moved, that upon such information it was the duty of the intestate to take down the "brow", that shortly afterwards by order of the conductor a car was moved against the one which the intestate was unloading, and the intestate was found caught between the "brow" and the building, suffering injuries from which he died. *Held*, that, on the evidence in the case, the questions whether sufficient time to remove the "brow" was given to the intestate, whether he was performing that duty with due diligence and skill, and whether the conductor was negligent in starting the car without taking more pains to ascertain the situation of the intestate, were for the jury, and that, in view of the damage to life and limb by a premature moving of the car, the question, whether the negligence of the conductor was gross, was for the jury. *Hartford* v. *New York, etc. Railroad*, 365.

On Street Railway.

Alleged defect in car.

16. In an action against a street railway company for injuries resulting in the death of the plaintiff's intestate who fell from the rear vestibule platform of an electric car of the defendant, the plaintiff contended that, owing to the improper construction of the door of the vestibule, the intestate in opening the door pinched a finger of his left hand which had previously been injured and that the pain in his finger caused him to faint and fall from the car. The testimony of the only witness who saw him open the door tended to show that he used his right hand in sliding it open, and there was no evidence that his left hand came in contact with it. There was nothing to show that he fainted or, if he did, what was the cause of his fainting. *Held*, that a verdict rightly was ordered for the defendant, the plaintiff's case being founded wholly on conjecture. *Williams* v. *Citizens' Electric Street Railway*, 437.

17. In an action against a street railway company, in which the plaintiff contended that his intestate had his finger pinched in the sliding door of the vestibule of an electric car of the defendant, owing to improper appliances for opening and shutting the door, the presiding judge excluded a question by the plaintiff as to whether a witness observed any difficulty in starting the door open from the outside in this car or one like it. *Held*, that the evidence was excluded rightly, as on the evidence in the case there was nothing to show that the injury to the intestate's finger was caused by any difficulty in starting the door open, and also because the door of another car like this might stick and open with difficulty and the door of this car move freely. *Ibid.*

18. In an action against a street railway company, in which the plaintiff contends that his intestate had his finger injured owing to an improper device for opening and shutting the door of the vestibule of an electric car after a verdict has been ordered for the defendant and the plaintiff has alleged exceptions, it cannot be assumed in favor of the plaintiff that an

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inspection of the car by the jury added anything to the evidence stated in his bill of exceptions. *Williams* v. *Citizens' Electric Street Railway*, 437.

Injuries in alighting.

19. In an action against a street railway company for an injury incurred when alighting from a car of the defendant, it appeared, that the accident occurred at six o'clock on an afternoon in October, but that it was not very dark, that the car having reached the destination of the plaintiff, some passengers got off and others got on, and the trolley was reversed, that the plaintiff, becoming aware that the car was about to go back, started out through the door to the front platform, where the motorman then was, and stepped off the car, that as he stepped upon the ground the car started suddenly and he fell, his foot being crushed by the wheel of the car. *Held*, that, even if the plaintiff could have been found to be in the exercise of due care, there was no evidence of negligence on the part of the defendant, there being nothing to show that the conductor or the motorman had any reason to suppose that the plaintiff was leaving the car when it was started. *Spaulding* v. *Quincy & Boston Street Railway*, 470.

20. In an action by a woman passenger against a street railway company for an injury sustained in alighting from a car of the defendant upon a narrow gravel embankment, if it appears that the embankment was not in a highway but on private land acquired by the defendant and within its exclusive control, that the conductor had stopped the car fifty feet beyond a level crossing at which the plaintiff seasonably had requested him to stop it, that within a few hours loose gravel had been deposited on the embankment, that the plaintiff was not cautioned in any way as to the security of the footing, and that when she stepped with one foot on the edge of the embankment it gave way, causing the injury, there is evidence on which a jury would be warranted in finding that the defendant was negligent in not notifying the plaintiff of the yielding nature of the recently deposited gravel upon its own roadbed where it had invited her to alight. Whether the conductor was negligent in failing to stop at the crossing is immaterial, that not being the proximate cause of the injury. *Joslyn* v. *Milford, etc. Street Railway*, 65.

Requirement of notice.

21. The provision of R. L. c. 112, § 44, requiring notice of the time, place and cause of an injury incurred in connection with the maintenance of the tracks of a street railway company in a public street, has no application to an action against a street railway company for an accident which occurred on a portion of its roadbed on land not in a highway and within the defendant's exclusive control. *Ibid.*

Burning out of fuse.

22. In an action against a street railway company by a passenger for personal injuries, the ordinary burning out of a fuse on an electric car is not *prima facie* evidence of negligence, but when there is evidence that the burning out of a fuse was attended by unusual results which would not have occurred if the fuse had been in proper condition, and that the fuse was so placed in the car that if there should be a harmful flame from its burning

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out it reasonably might be apprehended that the flame would reach and injure a passenger, there is evidence to go to the jury of negligence on the part of the defendant. *Cassady* v. *Old Colony Street Railway*, 156.

23. In an action against a street railway company for injuries from an explosion and flame attending the burning out of a fuse in a box placed directly under the seat of an open electric car on which the plaintiff was sitting, there was evidence which would warrant the conclusion that the intensity and duration of the flame produced by the explosion was greatly in excess of what could have been the result if the fuse had been in proper condition and that this imperfect condition of the fuse could have been discovered by the use of reasonable care. *Held*, that the defendant was not entitled to a ruling that the doctrine of *res ipsa loquitur* did not apply, and that the jury properly were instructed that it was for them to decide how far negligence could be inferred from the accident itself. *Ibid.*

24. In this action against a street railway company for injuries from an explosion and flame attending the burning out of a fuse in a box placed directly under the seat of an open electric car on which the plaintiff was sitting, it was held that the evidence stated by the court was sufficient to justify the jury in finding that the plaintiff was physically injured by the flame or electricity or both combined, and not merely frightened. *Ibid.*

Injuries to persons on track.

25. A child six and one half years old, passing over a cross walk from one side of a street to the other on her way to school, and following other children across an electric car track without looking to see whether a car is coming or listening for the ringing of a gong, is not as matter of law necessarily negligent, and, in an action by her against the railway company for injuries from being struck by the car, the question of her due care is for the jury. *McDermott* v. *Boston Elevated Railway*, 126.

26. If a person engaged in operating a stationary engine, used in constructing a sewer in a street, two feet from the track of an electric railway, steps upon the track directly in front of an approaching car eight or ten feet away, and is struck and killed by the car without regaining consciousness, no recovery can be had for his death without affirmative proof that he was exercising care to avoid being struck by the car. *Gleason* v. *Worcester, etc. Street Railway*, 290.

27. In an action against a street railway company for the death of the plaintiff's intestate, alleged to have been caused by being run into from behind by a car of the defendant on a highway, it appeared, that the plaintiff's intestate was run over on a cloudy night, when a strong wind was blowing, in the direction opposite to that in which the car was moving, and was making a great noise in the trees, and it was assumed by the court for the purpose of decision, that it might have been found that, when the car was approaching the plaintiff's intestate from behind and was only twenty or thirty feet distant, the intestate was walking between the rails of the defendant's track to avoid a wagon approaching him in front. *Held*, that, on this assumption, there was no evidence of due care on the part of the plaintiff's intestate which would justify the submission of the case to the jury. *Dooley* v. *Greenfield, etc. Street Railway*, 204.

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Violation of rule by defendant's servant.

28. In an action against a street railway company by the driver of a carriage, for injuries from being run into by a car of the defendant on which the motorman did not sound the gong, a rule of the defendant, in a book of rules issued to motormen and conductors, in regard to sounding the gong when passing vehicles and in other cases, is admissible to show negligence on the part of the motorman. *Stevens* v. *Boston Elevated Railway*, 476.

As to contributory negligence of parent or person in charge of child run over by electric car, see *ante*, 4, 5.

Negligence of street railway company in striking with slowing moving car wheel of wagon too near track, question of fact, see *ante*, 6.

Liability of street railway company for wanton and wilful act of motorman, see *ante*, 2, 3.

In Mill Yard.

29. A master mechanic of a mill corporation, attending to his business in the mill yard, is not a mere licensee when standing in a driveway near a pile of heavy timber placed there and being worked upon by servants of an independent contractor engaged in altering one of the buildings of the corporation, and, if the servants of the contractor by their negligence cause one of the timbers to fall upon the mechanic while he is standing there in the exercise of due care, he can recover from the contractor for his injuries. *Gile* v. *J. W. Bishop Co.* 413.

30. A master mechanic of a mill corporation may be found to be in the exercise of due care when standing in a driveway of the mill yard near a pile of heavy timber placed there by the servants of an independent contractor, with his back to the pile, conferring with the yard master on business of the mill, while the servants of the contractor are working on the timber, and, if he is injured owing to the negligence of the contractor's servants as to the mode of piling the timber or in rolling over one of the timbers so as to cause the outside timber to fall upon him, he can recover from the contractor for his injuries. *Ibid.*

In Building.

31. A workman employed in a shoe factory on the second floor of a building, who on the third morning of his employment is injured by falling down an elevator well when entering the building by a rear door on an alley way, may be found to have been in the exercise of due care, as against the owner of the building in control of the elevator, if it appears, that on the first morning he entered the building by the front door, that on the second morning he followed other workmen through a rear door into a small dark entry leading by a staircase to the factory, and that on the third morning, which was dark, he was alone, and, supposing that he was entering by the same rear door, entered another similar door near it which was open and led into the elevator well down which he fell. *Humphreys* v. *Portsmouth Trust, etc. Co.* 422.

As to mill operative injured by opening of trap door over elevator well, see *post*, 44–46.

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In Factory.

As to injury from band saw, see *post*, 47.

As to injury from movable steam pipe in beater in paper mill, see *post*, 43.

As to injury from spikes on revolving drum in cylinder of duster in paper mill, see *post*, 55, 56.

In Dock.

32. In an action for an injury to the plaintiff's vessel from grounding on a ledge of rock embedded in the mud at the bottom of the defendant's dock, it is not necessary for the plaintiff in order to recover to show that the defendant knew of the ledge if its existence could have been discovered by reasonable diligence. *Garfield, etc. Co.* v. *Rockland-Rockport, etc. Co.* 60.

33. Because the master of a vessel knows that in entering a certain dock he will have to go through some mud he does not take the risk of an injury to his vessel from a ledge of rock embedded in the mud, if in entering the dock he exercises reasonable care. *Ibid.*

34. In an action for an injury to the plaintiff's vessel from grounding on a ledge of rock embedded in the mud at the bottom of the defendant's dock, it appeared that the master before entering the dock reported the draught of his vessel to the defendant's agent in charge of the dock and inquired of him in regard to the depth of the water and the character of the bottom, and was assured by the agent that there was plenty of water and that the bottom was good. *Held*, that the master was justified in relying on the statement of the defendant's agent and was under no obligation to take soundings. *Ibid.*

Defective Staging.

35. In an action against a city for personal injuries from the breaking of a plank on which the plaintiff was working with another man, both of them belonging to a gang of city employees engaged in setting up a portable overhead railway to be used for carrying buckets in excavating a trench to hold a sewer pipe, it appeared, that there was a knot as large as the palm of a man's hand in the centre of the plank where it broke, and that such a plank would not hold two men, that there was a foreman present but that he took no part in selecting the planks used like this one as temporary stagings, and that the planks used for that purpose were selected by workmen on the ground from a pile of planks which had been delivered at the side of the street for general use in the work, and were handed up to other workmen on the uprights of the structure as they called for them. *Held*, that there was no evidence of negligence on the part of the defendant, which performed its whole duty toward the plaintiff by furnishing enough sound planks and employing competent persons as his fellow workmen. *Thompson* v. *Worcester*, 354.

36. In actions by two carpenters for injuries alleged to have been caused by their being set to work by the defendant's superintendent upon an unsafe temporary staging, constructed in an elevator well in a mill building, there was evidence, that one upright of the staging was fastened insecurely, and that two braces which at first had been used to keep it in place had been removed before the accident, that the staging was built by a superintend-

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ent of the defendant, for another job for which it had been used successfully as the plaintiffs knew, that another superintendent in effect told the plaintiffs to use the staging in doing their work and was at one time on the staging while the work was going on and knew that the plaintiffs were using it, that neither the superintendent who caused the staging to be built, nor the one who ordered them to work upon it or saw them at work there, had inspected the staging at any time since its completion. The staging fell while the plaintiffs were at work upon it and they were injured. *Held*, that whether the superintendents were negligent in furnishing the staging, and in directing or allowing the plaintiffs to use it, and whether the plaintiffs were in the exercise of due care, were questions of fact for the jury. *Bourbonnais* v. *West Boylston Manuf. Co.* 250.

37. In an action by a carpenter for injuries caused by the fall of a temporary staging built in an elevator well, there was conflicting evidence as to whether one of the uprights of the staging rested on brickwork. An expert was allowed to testify, that to build such a staging with one corner resting on a brick ledge was not a proper construction, also to give his reasons for this opinion and to testify as to the tendency of a brick ledge to loosen under pressure. *Held*, that there was no error in the admission of this evidence, and that it was not necessary for the judge to exclude it because the questions did not contain a statement as to the whole construction of the staging. *Ibid.*

38. In an action by a carpenter against his employer for injuries caused by the fall of a staging, evidence of a custom among carpenters, to make an examination of a staging to see whether it is in proper condition before going upon it, is not competent upon the issue of the plaintiff's due care without showing that the plaintiff knew of the custom. Whether if such knowledge were shown the evidence would be competent was not passed upon. *Ibid.*

In operating Electric Light Plant.

39. In an action against a corporation operating an electric light plant for causing the death of the plaintiff's intestate, an allegation in the declaration that the defendant negligently suffered its wires to be out of repair, is sufficient to raise the issue of a proper method of inspection. *Lutolf* v. *United Electric Light Co.* 53.

40. In an action against a corporation operating an electric light plant for causing the death of the plaintiff's intestate, it is evidence of negligence on the part of the corporation itself, that under its system of inspection it was the duty of no one to make a thorough examination oftener than once in nine days of each lamp fed by a wire carrying a dangerous electric current, and that the examinations once in nine days were made only in connection with the manual work of cleaning globes and renewing carbons, although twice each night inspectors drove past to see that the lamps were in working order. *Ibid.*

41. In an action against a corporation operating an electric light plant for causing the death of the plaintiff's intestate, there was evidence, that nearly an hour before the plaintiff's intestate was killed by an electric

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shock received near a pole of the defendant, a servant of the defendant at its power house had received messages by telephone that the pole was on fire and that a wire was down there, and instead of causing the current to be shut off, which would have prevented the fatality, ordered an inspector to go to the place, and that the inspector might have arrived in from five to eight minutes, but that more than half an hour elapsed before the accident and the inspector did not arrive until after it had occurred. *Held*, that the jury properly could find gross negligence on the part of the servant at the power house in not ordering the current to be turned off and also gross negligence on the part of the inspector in not arriving at the place of the accident within a reasonable time. *Lutolf* v. *United Electric Light Co.* 53.

Injury from Fright.

Certain evidence held to justify finding of physical injury, see *ante*, 24.

Res Ipsa Loquitur.

42. In a case where the doctrine of *res ipsa loquitur* applies, an unsuccessful attempt by the plaintiff to prove by direct evidence the precise cause of the accident does not estop him from relying on the inference of negligence from the accident itself. *Cassady* v. *Old Colony Street Railway*, 156.

Doctrine of, as applied to burning out of fuse on electric car, see *ante*, 23.

Employer's Liability.

Injury from movable pipe of beater.

43. In an action by a workman in a paper mill for injuries from being struck by the flying up of an iron pipe used to carry steam to a machine called a beater, it appeared, that the pipe that flew up was attached by a loose joint to a vertical pipe connected with the source of the steam, that if steam was applied suddenly it would cause the movable pipe to fly upward, that a workman about to let on the steam could stand in such a position that if the movable pipe flew up he would be out of the way, that a wire had been attached to the lower end of the movable pipe merely for the purpose of moving it when heated by steam, and not for the purpose of fastening it. The plaintiff testified that he had used the wire to lift the hot pipe and had run the beater for five days, during which he had lowered the movable pipe and turned on the steam at least twice on each day, and knew that if he let on the steam too quickly the pipe, if not fastened, would fly up. *Held*, that a verdict rightly was ordered for the defendant; that the plaintiff either appreciated the whole situation, or, if he mistook for a fastening the wire placed on the pipe as a means of raising it, this mistake was negligence on his part, that there was no evidence that the defendant failed in its duty in not providing a fastening, as the appliance could be used safely without one, and that the plaintiff voluntarily stood within the range of the motion of the pipe, if it should fly up, instead of standing where he could not be hit. *Alvey* v. *American Writing Paper Co.* 234.

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Injury from opening of trap door over elevator well.

44. Where a freight elevator in a cotton mill, which goes only one floor below that on which a woman operative is working, opens a trap door automatically in going up or down, and the only warning of the starting of the elevator is the moving of the elevator ropes, it is negligence as matter of law for the operative after looking at the ropes, which are quiet and show that the elevator is below, to walk across the trap door for a purpose which could have been accomplished by taking another and longer route, and, if in doing this she is injured by the trap door opening and squeezing her against the wall, she cannot recover from her employer. *Connors* v. *Merchants Manuf. Co.* 466.

45. Evidence of the use as a passageway of a trap door, over an elevator well in the floor of a mill, opened automatically by the elevator going up or down, does not warrant a finding that the corporation maintaining the mill invited its operatives to use the trap door as a passageway, unless there also is evidence that the corporation had knowledge of such use or evidence from which such knowledge can be inferred. *Ibid.*

46. An operative in a cotton mill crossing a trap door over a freight elevator two days after a statute has gone into effect requiring a warning device to be placed on such an elevator, but having no knowledge of the statute and no reason to suppose that the elevator is equipped with such a device, has no right to rely on the absence of such a warning of the opening of the trap door by the going up of the elevator, and if he so relies is negligent. *Ibid.*

Injury from band saw.

47. In an action by a workman in a picture frame factory against his employer, for the loss of his arm cut by a band saw, it appeared, that the plaintiff was twenty-seven years of age, had worked for six years about wood working machines, and knew what a band saw was, although he had never worked on one, that, on the first day of his employment by the defendant, by direction of the foreman he had marked out some patterns on wood and had taken them to the man who was working the band saw, when in laying them down on the table, through which the band saw passed, his arm came in contact with it, and he was injured. *Held*, that the danger of getting hurt if he came in contact with the band saw was a risk incident to the plaintiff's employment which he assumed, and that the defendant owed the plaintiff no duty to guard the saw or to change its position, and had no reason to suppose that the plaintiff needed any warning or instruction in regard to it. *Semble*, that the plaintiff was not in the exercise of due care. *Arkland* v. *Taber-Prang Art Co.* 243.

Explosion of varnish.

48. In an action against the owner of a building, for personal injuries from an explosion of varnish which the plaintiff had been ordered by the defendant to empty from a leaky barrel into other receptacles, it appeared that the plaintiff was an experienced carpenter employed by the defendant as an "all round" man to do general repairs in the building, and the defendant was not shown to have had any knowledge of the qualities of

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varnish other than that of an owner of buildings in the care of which he had caused varnish to be used. The plaintiff in the course of his work procured a lantern and held it near the bunghole of the barrel of varnish, when the explosion occurred. *Held*, that there was no evidence that the defendant had more knowledge of the danger or more opportunity for such knowledge than the plaintiff, and, as the plaintiff was proceeding under general directions and his injury came from the way he selected for doing the work, his injury if not caused by his own negligence was without fault on the part of the defendant. *Vallie* v. *Hall*, 358.

Reliance on rules not for protection of employees.

49. A section hand, whose duty requires him to stand between two tracks of a steam railroad in clearing deep snow from a switch, and who has to bend down in doing his work, is not in the exercise of due care if he fails to use his eyes in looking both ways for passing trains, relying on rules, not intended for the protection of section hands, which require a whistle to be sounded or a bell to be rung on engines or trains approaching from one direction the place where he is working. *Morris* v. *Boston & Maine Railroad*, 368.

Assumption of risk.

50. A workman in assuming the ordinary risks of his employment does not assume a risk caused by the negligence of a superintendent. *Mahoney* v. *Bay State Pink Granite Co.* 287.

51. A workman in a stone quarry, obeying the order of a superintendent to get upon a large stone and drill a line marked upon it by the superintendent, does not assume the risk of an injury from the slipping of the stone caused by the negligence of the superintendent in placing the stone in position by means of a derrick when the workman was not present. *Ibid.*

52. In an action for personal injuries incurred in the defendant's stone yard, it appeared, that the plaintiff was eighteen years of age and had been in the defendant's employ for five months learning a stone cutter's trade, that he had worked from time to time for four or five days on the cutting of a large stone tilted up by means of stone chips placed beneath it on the wooden blocks supporting it. He testified that he knew that if the stone was not suitably propped up he would get hurt and that he made no effort to inform himself how it was propped up. The plaintiff had finished working for the day, and was leaning over the stone in the act of picking up some tools which it was his duty to pick up, or in the act of picking up a match to light his pipe, when the stone fell upon him, causing the injury. *Held*, that the chance of the stone falling as it did was an obvious risk assumed by the plaintiff; *also*, that there was no evidence of due care on the part of the plaintiff or of negligence on the part of the defendant. *Archambault* v. *Archambault*, 274.

53. A master is not liable for an injury to a servant from an obvious danger of his employment, when the servant is permitted to do the work in his own way and can avoid the danger by the exercise of reasonable care. *Alvey* v. *American Writing Paper Co.* 234.

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54. In an action by a workman against a contractor by whom he was employed, it appeared, that the plaintiff was one of a gang of men engaged in lowering an iron boiler into a cellar by means of inclined beams, that a wire rope attached to the boiler was held by the men, who were to let it slip slowly around a wooden post as the weight of the boiler lowered it into position, that the rope cut into the post and its motion stopped, that the defendant said to the plaintiff, "The rope is all right. Come around here and slack it. Slack it with your hands", that the plaintiff attempted to loosen the rope with his hands, when it started, and caught his hands, causing the injury. *Held*, that the defendant's order should be construed as an order to the plaintiff to slack the rope with his hands in such a manner as should be safe and proper, and that the plaintiff assumed the risk of the obvious danger, which was increased by the position he chose to take in doing the work. *Lodi* v. *Maloney*, 240.

55. A boy fifteen years of age employed in a paper mill was ordered by a superintendent to go to work on a duster, a machine for beating dust out of rags, and to do as a certain workman did. The boy saw this workman, when the opening in a cylinder of the machine got clogged with rags, knock them out with a stick, and, on his attempting to do the same thing, his arm was injured by the spikes of a rapidly revolving drum within the cylinder. In an action against his employer for this injury, there was evidence that the plaintiff was not cautioned in regard to the danger or told what was behind the opening, and that when the drum was in motion a person in front of the machine could not see what was behind the opening. *Held*, that there was evidence of the defendant's negligence and of the plaintiff's due care, and that the risk was not an obvious one which the plaintiff assumed. *Joyce* v. *American Writing Paper Co.* 230.

56. A boy of fifteen employed in a paper mill, who once has helped to clean out one of the six cylinders of a machine for beating dust out of rags, which are alike on the outside, is not thereby chargeable with knowledge of the interior of another of the cylinders, containing a revolving drum with a spiral line of spikes on it, from which he suffers injury. *Ibid.*

Negligence of fellow servant.

57. In an action by a workman in a foundry against his employer for injuries from the breaking of a rope which a fellow workman had used to attach an iron plate to a travelling crane, it appeared, that each workman when attaching articles to the crane used the chain, strap or rope which he chose for the purpose, that no special place was provided for keeping these appliances and that they commonly were left on the floor which was likely to be wet and more or less full of sand, but it did not appear that the rope in question or any appliances had been injured in this way. There was a superintendent in charge. *Held*, that if the rope was chosen negligently this was the act of a fellow servant for which the defendant was not liable, and that the fact that the superintendent did not prevent workmen from leaving chains, straps and ropes on the floor when not in use or from using ropes for purposes for which they were not suitable, was not evidence of negligence on his part. *Morrison* v. *Whittier Machine Co.* 39.

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Negligence of superintendent.

58. A person employed in a stone quarry, who gave directions to twenty-two men employed there, sometimes discharged men, marked with chalk lines the places where drilling was to be done by the workmen, and never drilled himself, may be found to have been a superintendent whose sole or principal duty was that of superintendence within the meaning of the employers' liability act, although there was another superintendent of the whole business, who was not in the habit of staying at the quarry and sometimes did not come there for a whole day. *Mahoney* v. *Bay State Pink Granite Co.* 287.

59. The proprietor of a stone quarry may be found to be liable to a workman in his employ injured by the slipping of a large stone on which the plaintiff was at work by order of the defendant's superintendent, drilling a line marked by the superintendent, if the slipping of the stone was due to the negligence of the superintendent in placing the stone in position by means of a derrick worked by two men under his direction, it having been the superintendent's duty to determine where and how the stone should be placed for work to be done upon it. *Ibid.*

60. A workman in a stone quarry injured by the slipping of a large stone on which he was at work by order of the defendant's superintendent, drilling a line marked by the superintendent, may be found to have been in the exercise of due care, if the accident was caused by the negligence of the superintendent in placing the stone in position by means of a derrick, and the plaintiff was not present when the stone was put in position and his attention was not directed to the risk of its slipping. He might treat the direction to work upon the stone as an implied assurance that he could work there safely, from one who ought to know. *Ibid.*

61. In an action by a car inspector employed in a freight yard of the defendant, for injuries alleged to have been caused by the negligence of the defendant's superintendent or of a person in charge and control of a train of the defendant, it appeared, that the defendant's yard master was the only person who controlled the switching of trains in the yard, and, although he had no right to order a car to be moved until the train of which it was a part had been inspected by the plaintiff, any order from him to the switching crew would be obeyed whether the inspection had been completed or not, and that, while the plaintiff in the course of his duty as inspector was repairing a car, the yard master caused six or seven cars, which had formed part of the same train, to be moved forcibly against the car which the plaintiff was repairing, so that it knocked him down and ran over him. *Held*, that there was evidence that the yard master was a superintendent exercising superintendence within the employers' liability act, and that he also was a person in charge or control of a train. *Brady* v. *New York, etc. Railroad*, 225.

No evidence of negligence of superintendent that he did not prevent workmen from leaving ropes on floor of foundry when not in use or from using them for purposes for which they were not suitable, see *ante*, 57.

Negligence of superintendent in furnishing staging, see *ante*, 36.

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Liability to employee for injury from defective staging, see *ante*, 35, 36.
Master liable for acts of servant done recklessly or wilfully in course of employment, see MASTER AND SERVANT, 2.

Leaving water pipe temporarily on sidewalk parallel with curbstone not evidence of negligence on part of city, see MUNICIPAL CORPORATIONS, 6.

OFFICER.

1. In an action against a constable for accepting insufficient sureties on a replevin bond, it is not necessary that the plaintiff should have recovered judgment on the bond, if he brought an action on the bond which failed because the defendants could not be found. *Stern* v. *Knowlton*, 29.
2. In an action by a constable who was a defendant in replevin against another constable for accepting insufficient sureties on the replevin bond, the plaintiff may show by oral evidence that the property replevied was the same which he had attached upon a certain writ placed in his hands for service. *Ibid.*
3. In an action by one who was a defendant in replevin against a constable for accepting insufficient sureties on the replevin bond, the plaintiff may show upon the question of damages the amount which he agreed to pay his counsel for services in the replevin action and in an action on the replevin bond. *Ibid.*

Officer's return not to be contradicted, see POOR DEBTOR, 5.
For purpose of justifying sale on execution, execution may be returned into court at any time before being put in evidence, see EXECUTION.

PARTNERSHIP.

Evidence of Partnership.

1. To show that the defendants in an action of contract for goods sold and delivered were partners of a certain firm to which the plaintiff had sold the goods, postal cards and a letter received by the plaintiff representing the defendants as members of the partnership were held to have been admitted in evidence rightly, having been found by the jury to have been issued and written in the usual course of business and by authority of the defendants. *Sumner* v. *Gardiner*, 433.
2. In an action of contract against several defendants as members of a partnership, the plaintiff, in order to show that one of the defendants was a member of the partnership, may testify that he made a statement to this defendant that he understood that this defendant was a member of the partnership and that he had brought his action to prove it, and that the defendant made no reply. *Ibid.*

Compensation of Partner for Services.

3. Although it is the rule that in the absence of an express agreement a partner is not entitled to compensation for services rendered in the business of the firm, yet the partnership may be of such a peculiar kind and the

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arrangement and course of dealing between the partners may be such that an agreement to pay for certain services of one of the partners may be inferred from the facts without an express agreement. *Hoag* v. *Alderman*, 217.

4. In a suit for an accounting by the defendant as a partner of the plaintiff in the purchase, management and sale of certain real estate, the defendant claimed an allowance of $500 as compensation for his services in the care and management of the property. It appeared, that the title to the property was taken in the name of the defendant and that in the receipt which he gave the plaintiff for the money contributed toward the purchase it was stated that the plaintiff was "to bear one third of the expenses in connection with said property", that the defendant took charge of necessary repairs upon the property, buying the materials and superintending the work, and that he also collected the rents. There was a third partner who retired from the partnership, and it was agreed orally by him, the plaintiff and the defendant, that the defendant should receive $1,500 for his services in connection with the property, of which the retiring partner should pay $500 and the plaintiff $500. The retiring partner paid this $500 in his settlement with the defendant. The trial judge found that the defendant was entitled to be allowed $500 for his services as against the plaintiff. *Held*, that the oral agreement, although as a new undertaking it would have been without consideration, was important evidence of the original understanding of the three partners in regard to the meaning of the term "expenses" in relation to the services of the defendant in connection with the property, and that the facts warranted the finding of the judge. *Ibid.*

PAUPER.

Settlement.

1. Clause 7 of Pub. Sts. c. 83, § 1, providing that married women "who have not a settlement derived by marriage" may gain a settlement by residing in any place within this State for five years, refers to a marriage then existing, and does not exclude a woman who being the widow of a man with a settlement in this Commonwealth married a man without such a settlement and lived in a city of this Commonwealth for five consecutive years. *Bradford* v. *Worcester*, 557.
2. Under clause 7 of Pub. Sts. c. 83, § 1, a married woman whose husband has no settlement in this Commonwealth can gain a settlement by residing in a city of this Commonwealth for five consecutive years, although during the whole of that period her husband has been absent from the Commonwealth wandering from State to State. *Ibid.*
3. Under St. 1874, c. 274, and St. 1878, c. 190, as amended by St. 1879, c. 242, a married woman of the age of twenty-one years, coming in 1869 to a town in this Commonwealth with her husband who never acquired a settlement in this Commonwealth, and living there with her husband and children for five years continuously, without receiving relief as a pauper, if alive in this Commonwealth in 1879, can be found to have had a settle-

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ment in the town, being an unsettled woman within the meaning of § 2 of St. 1879, c. 242, at the time of the passage of that act, and an unsettled person within the meaning of § 3 of St. 1874, c. 274. *Williamsburg* v. *Adams*, 263.

PAYMENT.

Of note, see BILLS AND NOTES, 7, 8.

In action to enforce claim held as security, payment of principal debt matter of defence, to be alleged and proved, see EVIDENCE, 2.

Payment by one of two wrongdoers discharges the other, see EQUITY PLEADING AND PRACTICE, 5.

PLEADING, CIVIL.

Declaration.

Count not sufficient as declaration for deceit, see DECEIT.

Declaration founded on failure to levy assessment held to be in contract notwithstanding allegations of fraud and unlawful action, see FRATERNAL BENEFICIARY ASSOCIATION, 2.

Sufficient allegation of negligent method of inspection of electric light plant, see NEGLIGENCE, 39.

What not proper averment of special damage in action for slander, see SLANDER, 2.

Declaration on poor debtor's recognizance need not set forth facts which gave special justice jurisdiction to take recognizance, see POOR DEBTOR, 2.

PLEADING, CRIMINAL.

A count under R. L. c. 218, § 38, charging that the defendant "did steal" a sum of money named of the property of the estate of a certain person, deceased, sufficiently charges the defendant with the crime of embezzlement of money held by him as administrator as described by Pub. Sts. c. 203, § 46, (R. L. c. 208, § 48.) *Commonwealth* v. *Kelley*, 320.

Sufficiency of complaint under R. L. c. 214, § 8, for suffering turkey to be raffled for and won by throwing dice, see LOTTERY, 1–3, 5.

POOR DEBTOR.

Recognizance.

1. A recital in a poor debtor's recognizance that the debtor has been arrested on execution by virtue of Pub. Sts. c. 162, and desires to take the oath for the relief of poor debtors, will be taken to refer to the statute as amended. *Bent* v. *Stone*, 92.

2. In an action upon a poor debtor's recognizance taken before a special justice of a district court, it is not necessary that the recognizance should state the facts which gave the special justice jurisdiction, or that they should be set forth in the declaration, if they appear by the record of the district court. *Ibid.*

3. In an action upon a poor debtor's recognizance the presiding judge in his

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discretion may allow the introduction in evidence of an amendment made by a special justice of a district court of the record of his court while the action on the recognizance is pending, stating that when he took the recognizance in question he was holding court in the absence of the standing justice. *Bent* v. *Stone*, 92.

4. In an action on a poor debtor's recognizance, if it appears by the record of a district court that four executions were issued and the debtor was arrested on the fourth, and that a certificate of arrest was made by a justice of the court and attached to the second execution, and a certified copy of that certificate was attached to the execution on which the arrest was made, and it does not appear that no oath or affidavit was made and no objection seems to have been taken by the debtor when arrested that the arrest was unlawful because there was no oath or affidavit, it may be assumed that there was an oath or affidavit which justified the certificate of arrest. *Ibid.*
5. In an action against a surety on a poor debtor's recognizance, if it appears by the return of a deputy sheriff on an execution that he arrested the debtor and brought him before a certain district court where he was admitted to bail, the defendant cannot be allowed to contradict this return by showing that the deputy sheriff allowed the debtor to be taken from his custody by a constable not qualified to serve civil process and exercised no further control over him, thus permitting an escape. *Ibid.*
6. In an action against the surety on a poor debtor's recognizance, if the plaintiff is entitled to recover the full amount of the penalty of the recognizance he may recover interest thereon from the date of the writ. *Ibid.*

POWER.

As to revocation by marriage of portion of will exercising power of appointment, see WILL, 2, 3.

PRACTICE, CIVIL.

Abatement.

Appeal from decree of Probate Court that petitioner is living apart from her husband for justifiable cause does not abate on death of petitioner, testate, see HUSBAND AND WIFE, 2.

Amendment.

Discretion of judge of Superior Court to allow evidence of amendment of record of district court made while action on recognizance in Superior Court is pending, see POOR DEBTOR, 3.

Appeal.

Effect of appeal to Superior Court from decree of Probate Court ordering separate maintenance of wife, and of death of wife pending such appeal, see HUSBAND AND WIFE.

Costs.

1. Where commissioners were appointed under a statute, to determine the amount due to a town for water supplied to the Commonwealth, on a fail-

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ure of the parties to agree on the amount due, and neither the petitioner nor the respondent was satisfied with the award, the petitioner was regarded as the prevailing party, and as such entitled to costs in the proceedings before the commissioners, the award being silent as to costs. *Selectmen of Danvers* v. *Commonwealth*, 502.

Exceptions.

2. Rule 48 of the Superior Court, that "when further instructions are given in the absence of counsel after the jury have retired, the presiding justice may permit exceptions thereto at any time within twenty-four hours next following", is reasonable, and is binding on the parties to an action. Where instructions are so given on a legal holiday which falls on a Friday and the court does not convene again until the following Monday an exception to these instructions taken on the last named day cannot be allowed. *McCoy* v. *Jordan*, 575.
3. Under R. L. c. 166, § 5, c. 158, § 4, a presiding judge may give further instructions to a jury on a legal holiday. *Ibid.*
4. No exception lies to an erroneous instruction which could not have harmed the excepting party. *McKenzie* v. *Gleason*, 452.
5. The exclusion of evidence on the direct examination of a witness is no ground for exception if the evidence thus excluded was brought out later on his cross-examination. *Post* v. *Leland*, 601.
6. Where a plaintiff, seeking to prove that the defendant's title to certain real estate had been confirmed by a judgment, called the defendant as a witness and the defendant admitted the fact without objection or exception, it was held not to be open to the defendant in this court to raise the point that his title by judgment being a matter of record could not be proved by his oral admission. *Selleck* v. *Garland*, 596.
7. In an action of contract the plaintiff put in evidence an auditor's report and rested. Thereupon the defendant asked the judge to rule that certain findings of the auditor were rulings of law and should be disregarded by the jury. The judge refused to make the ruling at that time on the ground that the auditor's report made out a case for the plaintiff without the findings in question. The defendant then introduced his evidence, and when the case was submitted to the jury did not renew his request. *Held*, that the request was refused properly at the time it was made, and that when the case was submitted to the jury the judge was not bound to act upon the previous request. *Plunger Elevator Co.* v. *Day*, 130.

In action against street railway company for injury from alleged defect in car, inspection of car by jury will not be presumed to have furnished evidence for excepting party not stated in bill of exceptions, see NEGLIGENCE, 18.

New Trial.

8. If the judge who tried a case dies while a motion for a new trial is pending and the party making the motion proceeds with it before another judge, he cannot after a denial of his motion take the ground that the judge had no power to deny it. *Lutolf* v. *United Electric Light Co.* 53.

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Nonsuit.

9. A plaintiff has a right to become nonsuit when a hearing before an auditor has been finished but the auditor's report has not been filed. *Carpenter & Sons Co.* v. *New York, etc. Railroad*, 98.

Parties.

Trustee in bankruptcy proper plaintiff in action by bankrupt pending at time of adjudication, unless he prosecutes action in name of bankrupt or elects not to assume it, see BANKRUPTCY, 2.

Referees' Award.

10. On an award of commissioners, appointed under a statute as referees, the only questions of law open are those referred by the commissioners to the court. *Selectmen of Danvers* v. *Commonwealth*, 502.

11. A full statement by referees in their award of the principles of law on which they proceeded is not enough to submit to the court the correctness of those principles or of their application to the case. *Ibid.*

Variance.

Where defence of variance not open by reason of certain agreement in bill of exceptions, see WAY, 4.

Verdict.

12. Where the circumstances attending the return of a verdict were such as to raise a doubt whether it was unanimous, but the jurors by their foreman had signed the verdict and it was affirmed, all the jurors assenting to it although one of them said that he did so under protest, there was held to be no error of law on the part of the presiding judge in refusing to treat the verdict as illegally received and recorded. *McCoy* v. *Jordan*, 575.

View.

Where inspection by jury not presumed to add to evidence stated in record, see NEGLIGENCE, 18.

PRACTICE, CRIMINAL.

Where a bill of exceptions in a criminal case alleges that the defendant was "brought before said court by virtue of a complaint in due form of law, issued by said court", and nothing in the record indicates that any question of jurisdiction was raised, it will be assumed that a warrant was duly issued and served. *Commonwealth* v. *Conlin*, 195.

Grand jury may find indictment for murder in second degree, see HOMICIDE, 1.

Trial of indictment for murder in second degree not capital case, and may be tried before one justice of Superior Court, see HOMICIDE, 2.

PROBATE COURT.

Question whether appointment by will is revoked by marriage of donee of power not involved in decree of Probate Court allowing will, see WILL, 2.

Effect of appeal from decree of, ordering separate maintenance, see HUSBAND AND WIFE, 1, 2.

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PROHIBITION.

1. Assuming that in this Commonwealth a writ of prohibition sometimes may be granted on the petition of a stranger, the granting of the writ in such a case is not a matter of right but of discretion. *Kilty* v. *Railroad Commissioners*, 310.

2. A writ of prohibition cannot be issued to prevent a proceeding which is not judicial. *Lodge* v. *Fletcher*, 238.

Investigation by board of aldermen of Chicopee of granting of licenses by licensing board not judicial proceeding, and so not subject of writ of prohibition, see CHICOPEE, 1, 2.

In view of remedy in equity given by R. L. c. 112, § 100, court will refuse writ of prohibition to correct error of railroad commissioners in regard to street railway company, in any ordinary case, see STREET RAILWAY, 2.

PROXIMATE CAUSE.

Telegraph pole proximate cause of injury caused by wagon falling into depression in highway and against pole, see TELEGRAPH COMPANY, 2.

Failure to stop electric car at crossing not proximate cause of plaintiff's injury in alighting at different point, see NEGLIGENCE, 20.

Liability for selling damaged oats impregnated with poison for use of plaintiff's horses, see SALE, 2.

PUBLIC OFFICER.

Compensation of license commissioner, see MUNICIPAL CORPORATIONS, 1.

Person bound at his peril to ascertain extent of authority of public officer with whom contracting, see MUNICIPAL CORPORATIONS, 4.

RAILROAD.

Damages from Alteration of Crossing.

1. On a petition of a railroad company under R. L. c. 111, § 135, for damages from the alteration of a crossing of a highway with the railroad of the petitioner, the award of a special commission appointed under R. L. c. 111, §§ 136, 137, is material and admissible in evidence, as the special commission, in apportioning the expenses between the railroad company and the town, could decide that the railroad company should contribute to the alteration its land and all damages suffered by it, in which case its only remedy, if aggrieved, would be by an application for a jury under § 138 of the same chapter, while in the absence of such a decision by the special commission, the railroad company would have the same right to compensation under § 135 that a stranger would have. *New York, etc. Railroad* v. *Blackstone*, 491.

2. An award of special commissioners, under R. L. c. 111, § 136, relating to the widening of a street of a town between two abutments supporting an

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overhead bridge of a railroad company, directed the town to pay "the entire expense of land damage occasioned by the taking of land and property for the widening" of the street, and that all other charges and expense occasioned by carrying into effect such decision should be paid two thirds by the railroad company and one third by the town. *Held*, that under this award the town was to pay for an abutment of the bridge on land of the railroad company taken for the street as well as for the land itself, that the town also was to pay to the railroad company the extra expense of the new bridge and abutment made necessary by the widening of the street, after deducting the increased value of the new structure over the old to the railroad company for use in its business, and also was to pay to the railroad company the expense of removing to a new location a water crane and valve pit, upon land adjacent to that taken, used for furnishing water to locomotives and required to be moved by reason of the construction of the new abutment. *New York, etc. Railroad* v. *Blackstone*, 491.

3. On a petition by a railroad company under R. L. c. 111, § 135, for damages from the alteration of a crossing of a highway with the railroad of the petitioner, if a special commission appointed under R. L. c. 111, §§ 136, 137, has made an award, providing, among other things, that the railroad company shall pay all future charges for keeping in repair the abutments and foundations of the railroad bridge over the highway, the petitioner is not entitled to compensation because it is required by a decree of the county commissioners to maintain a bridge to span a street thirty-three feet wide instead of a street nineteen feet wide, as it was before the alteration. *Ibid.*

Negligence and superintendence in freight yard, see NEGLIGENCE, 12–14, 61.
Evidence of acquiescence in abandonment of rule, see NEGLIGENCE, 12.
Negligence of signalman and of engineer in charge of freight train in action for death of engineer from collision, see NEGLIGENCE, 10.

RAILROAD COMMISSIONERS.

Jurisdiction to revise action of, see STREET RAILWAY, 1, 2.

RELIGIOUS SOCIETY.

Oldest Episcopalian, Congregational and Presbyterian churches in Boston, see CHARITY, 2.

RULES OF COURT.

As to rule 48 of Superior Court, see PRACTICE, CIVIL, 2.

SALE.

Acceptance.

1. In an action for the price of an engine stop, it appeared, that the stop had been placed by the plaintiff on an engine of the defendant for a

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certain period of trial, to be removed by the plaintiff if the defendant did not like it, otherwise to be purchased at a price named. The period expired on a Friday. On Saturday the defendant used the stop, and on Monday the stop was used but on the same day the defendant notified the plaintiff to remove it. *Held*, that, although the use of the stop on Monday was deprived of all force as evidence of an election to take the stop by the notice to remove it, yet the use of the stop on Saturday unexplained was evidence to go to the jury on the question whether the defendant on that day elected to take the stop and changed his mind on Monday. *Springfield Engine Stop Co.* v. *Sharp*, 266.

Implied Warranty of Fitness.

2. One who sells oats damaged by a fire at a reduced price, knowing that the purchaser is buying the oats to feed his horses, and knowing that there was paris green in broken packages in parts of the room in which the oats were at the time of the fire, and that by reason of the fire and the water used in extinguishing it the oats might have become impregnated with the poison, is liable for the loss of the purchaser's horses killed by eating the oats. *Provost* v. *Cook*, 315.

To recover price of milk plaintiff must prove that milk furnished was of quality required by R. L. c. 56, § 56, see MILK, 2.

SEWERS.

City not liable for damage caused by insufficiency of sewer system, see MUNICIPAL CORPORATIONS, 5.

SHADE TREES.

Shade tree about eighteen inches from outer edge of running board of open car held not to be defect in highway of town, see WAY, 16.

SHIP.

Action for grounding of vessel on ledge in defendant's dock, see NEGLIGENCE, 32–34; DAMAGES, 2.

SIGNATURE.

One ratifying forged signature is bound by it, see BILLS AND NOTES, 1.

SLANDER.

1. To charge a person orally with having sold his vote at an election does not impute the commission of a crime and is not actionable without averment and proof of special damage. *Doyle* v. *Kirby*, 409.
2. In a declaration for alleged slander in charging the plaintiff, who was a candidate for mayor of a city, with having sold his vote at an election, an averment, that the plaintiff was greatly injured in his candidacy for the office of mayor, is not a proper averment of special damage. *Ibid.*

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STATUTE.

Amendment and Repeal.

An amendment of a statute by striking out a certain section and substituting a new one in its place has in its form no significance as tending to show a repeal of the section amended. In such a case only those parts of the original statute which are inconsistent with the amended statute are repealed by implication. *Wilson* v. *Head*, 515.

R. L. c. 8, § 4, cl. 2, as to effect of repeal of penal statute does not apply to amendment of remedial statute, see WAGERING CONTRACTS, 3.

Validity and effect as to pending cases of amendment to St. 1890, c. 437, see WAGERING CONTRACTS, 1–4.

Ignorance of new statute as affecting due care, see NEGLIGENCE, 46.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED AND EXPOUNDED.

See page 685.

STREET RAILWAY.

Decision of Railroad Commissioners as to Preliminary Requirements.

1. Whether the decision of the railroad commissioners as to the performance of the requirements preliminary to the establishment of a street railway corporation, under R. L. c. 112, § 13, c. 111, § 46, is final, or is subject to revision by this court on questions of law, was left open in this case. *Kilty* v. *Railroad Commissioners*, 310.

Remedy for Error of Railroad Commissioners.

2. In view of the provision in R. L. c. 112, § 100, which gives to any interested party a remedy in equity in case of any erroneous ruling of any State board or commission relative to street railways, this court will refuse in any ordinary case to issue a writ of prohibition to correct an error of the railroad commissioners in regard to a street railway company. *Kilty* v. *Railroad Commissioners*, 310.

Enforcement of Conditions imposed by Grant of Location.

3. Under St. 1898, c. 578, § 25, (R. L. c. 112, § 100,) the selectmen of a town are the proper parties to bring a bill in equity to compel the enforcement of an order made by them as to the construction of the road of a street railway company in accordance with the grant of location. *Selectmen of Gardner* v. *Templeton Street Railway*, 294.

4. If the selectmen of a town in granting a location to a street railway company under St. 1898, c. 578, § 13, (R. L. c. 112, § 7,) prescribe that the work shall be done to their satisfaction, their determination, at least

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in the absence of fraud, is final, and it is immaterial whether they ought to have been satisfied or not. *Selectmen of Gardner* v. *Templeton Street Railway*, 294.

5. In a suit in equity by the selectmen of a town against a street railway company, under St. 1898, c. 578, § 25, (R. L. c. 112, § 100,) to enforce an order of the plaintiffs as to the construction of the defendant's road in accordance with the grant of location, it is immaterial that the defendant is financially embarrassed and is not able to carry out the order of the plaintiffs. *Ibid.*

6. The obligation of a street railway company to construct its road in accordance with its original grant of location, imposing certain conditions as to paving its roadbed, is not affected by the exemption contained in St. 1898, c. 578, § 11, (R. L. c. 112, § 44,) as to making repairs on the surface of streets. *Ibid.*

7. Under St. 1898, c. 578, § 13, (R. L. c. 112, § 7,) the selectmen of a town, in granting an original location to a street railway company, may prescribe that the company at its election can use from one designated point to another a cheaper rail without granite paving, on condition that if that portion of the road proves unsatisfactory to the selectmen, they, within a specified time, may order the track removed and a certain more expensive rail with granite paving to be substituted, and an order of the selectmen requiring such removal and substitution will be enforced in a suit in equity brought under St. 1898, c. 578, § 25, (R. L. c. 112, § 100.) *Ibid.*

Injury from burning out of fuse in electric car, see NEGLIGENCE, 22–24, 42.

Negligence in inviting passenger to alight at improper place, see NEGLIGENCE, 20.

R. L. c. 112, § 44, as to notice of injury does not apply to accident on roadbed not in highway and within defendant's exclusive control, see NEGLIGENCE, 21.

Liability for wanton and wilful act of motorman, see NEGLIGENCE, 2, 3.

SUPERIOR COURT.

Indictment for murder in second degree may be tried before single justice of, see HOMICIDE, 2.

Jurisdiction of, to enforce its decree on appeal from decree of Probate Court ordering separate maintenance, see HUSBAND AND WIFE, 1.

Appeal from decree of Probate Court that petitioner is living apart from her husband for justifiable cause does not abate on death of petitioner, testate, see HUSBAND AND WIFE, 2.

As to Rule 48, see PRACTICE, CIVIL, 2.

SURETY.

On executor's bond when liable for penal sum of bond with interest, see EXECUTOR AND ADMINISTRATOR, 3.

Liability of surety on executor's bond for debt due from insolvent executor to testator, see EXECUTOR AND ADMINISTRATOR, 2.

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TAX.

On Corporate Franchise, Distribution of.

Shares of a domestic manufacturing corporation purchased by the corporation itself and held for its benefit by a trustee residing in a city of this Commonwealth, assuming that the shares are to be treated as outstanding, are not taxable either to the corporation or the trustee, and the city in which the trustee resides is not entitled under R. L. c. 14, § 61, to be paid by the Commonwealth any proportion of the corporate franchise tax collected from the corporation as corresponding to the amount of the stock so held. *Worcester* v. *Board of Appeal*, 460.

TELEGRAPH COMPANY.

1. Under Pub. Sts. c. 109, § 12, (R. L. c. 122, § 15,) a telegraph company is liable to a traveller on the highway who in the exercise of due care is injured by a post erected and maintained by the company in accordance with a municipal license and without negligence. LATHROP, J. dissenting. *Riley* v. *New England Tel. & Tel. Co.* 150.
2. In an action under Pub. Sts. c. 109, § 12, against a telegraph company for personal injuries, it appeared, that the plaintiff was thrown from a provision wagon by its coming in contact with a telegraph pole of the defendant set inside the curbstone of a sidewalk, that beside the pole was a standpipe for filling watering carts, the dripping from which had caused a depression of small area two or three inches in depth in the cobblestone pavement near the curbstone; that the forward wheel of the plaintiff's wagon fell into this hollow, whereupon the body of the wagon lurched toward the pole and a portion of the wagon striking the pole the plaintiff was thrown out and injured. The pole was erected in accordance with a municipal license. *Held*, that under the statute the defendant was liable, if the plaintiff was in the exercise of due care, although the pole was maintained in accordance with the license and the defendant was not negligent. LATHROP, J. dissenting on the ground that the depression in the highway and not the pole was the proximate cause of the injury, as well as upon the construction of the statute. *Ibid.*

TRESPASS.

Not proper remedy for acts done under defective order laying out street, see WAY, 13, 14.

TRUST.

Resulting.

In a suit by a widow to establish a resulting trust in certain land standing in the name of her late husband, it appeared, that the plaintiff had contributed $1,000 toward the purchase of the land for $2,500, that the plaintiff stipulated that her name should be in the deed and that it should

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appear in the deed for her interest in the property, and that her husband agreed to this but instead of keeping his agreement took the whole title in his own name. The trial judge found that it was understood between the plaintiff and her husband that she should have a two fifths interest in the land and that it was on that understanding that she parted with her money. *Held*, that on the finding a resulting trust was established. *Skehill* v. *Abbott*, 145.

Charitable.

As to charitable fund created by will of Benjamin Franklin, and as to powers and duties of managers of charitable trust, see CHARITY, 1–5.

TRUSTEE PROCESS.

Balance due under contract substantially performed not "future earnings," see ASSIGNMENT, 2.

USAGE.

For cross references, see CUSTOM.

VENDOR AND PURCHASER.

Vendee's right to specific performance, see EQUITY JURISDICTION, 10.
Contract for sale of land, giving vendee right of possession, including right to lease to another, see LANDLORD AND TENANT, 1.

WAGERING CONTRACTS.

Validity and Effect of Amendment of Statute.

1. St. 1890, c. 437, as to wagering contracts was amended by St. 1901, c. 459, which confined the right to recover money paid on margins to cases where there is an affirmative intention that there should be no purchase or sale of securities and where there is no actual purchase or sale and no valid contract therefor, whereas under St. 1890, c. 437, there was a right of recovery where there was only a negative lack of intention as to performance of the contract. *Held*, that the amendment applies to cases pending at the time of its enactment and so applied is constitutional. *Wilson* v. *Head*, 515.
2. The right given by St. 1890, c. 437, to recover money paid on wagering contracts, was not a right of property belonging to persons who had brought actions under that statute and lawfully could be restricted as to pending cases by St. 1901, c. 459. *Ibid.*
3. The provision of R. L. c. 8, § 4, cl. 2, that the repeal of an act shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, does not apply to the right under St. 1890, c. 437, to recover money paid on wagering contracts as restricted by St. 1901, c. 459, the statute amended being remedial and not penal. *Ibid.*
4. St. 1890, c. 437, § 2, giving the right to recover money paid on wagering contracts, was amended and not repealed by St. 1901, c. 459, and so far

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as it was unchanged by the later act remained in force as to transactions which occurred before the amendment. *Loughlin* v. *Parkinson*, 565.

Contract to carry.

5. Where one employs a broker to buy and sell stocks for him, and the broker actually buys the stocks with his own money and receives the certificates for them, and later the stocks are actually sold upon the order of the customer or under authority given by him, there is no wagering contract under St. 1890, c. 437, § 2, although the transactions are conducted without actual delivery of the certificates of stock to the customer. *Post* v. *Leland*, 601.
6. In an action against a broker under St. 1890, c. 437, § 2, for money paid on margins, the reading by the judge to the jury of an extract from the opinion of the court in *Rice* v. *Winslow*, 180 Mass. 500, 502, was approved as being a correct statement of the law which illustrated one phase of the case on trial. *Ibid.*

Proof of Intent of Plaintiff and Reasonable Cause to believe on Part of Defendant.

7. In an action against a broker under St. 1890, c. 437, § 2, for money paid on margins, where it appeared that the defendant actually bought the stocks, received certificates for them and carried them for the plaintiff, although the certificates were not delivered to the plaintiff but were held by the defendant until they were sold for the benefit of the plaintiff, an instruction, that the plaintiff must show, by a fair preponderance of the evidence, that in his employment of the defendant he did not intend to have him buy any stock or sell any stock and that the defendant had reasonable cause to believe that the plaintiff did not intend to have him buy any stock or sell any stock, was held to be sufficient without using the language requested by the plaintiff. *Post* v. *Leland*, 601.
8. In an action under St. 1890, c. 437, for money paid on wagering contracts, a plaintiff cannot be allowed to testify that when he received a notice from the defendants stating that they had "bought" certain stock on his account he did not understand what was meant. *Ibid.*
9. In an action against a broker under St. 1890, c. 437, § 2, for money paid on margins, the fact that the defendant actually purchased the stock at the request of the plaintiff, and held it subject to his own control until his lien was paid, properly may be considered by the jury upon the question whether the defendant had reasonable cause to believe that the plaintiff was carrying on a wagering contract. *Ibid.*

WAIVER.

Certain acts in behalf of company, insuring against liability for personal injuries, not evidence of waiver by company of objection that notice in writing of accident was filed too late under terms of policy, see INSURANCE, 10.

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Proceeding in hearing in equity without objection waives objection of adequate remedy at law, see EQUITY PLEADING AND PRACTICE, 1.
Receipt of instalments after date fixed in contract no waiver of right to avoid contract for failure to pay later instalments as agreed, see CONTRACT, 18.
Waiver by railroad company of breach of duty by station agent, and its effect as to future breaches, see CONTRACT, 19.

WATERWORKS.

Award under St. 1898, c. 564, for Water furnished by Town of Danvers for Lunatic Hospital.

1. The town of Danvers and the commissioners of the lunatic hospital acting for the Commonwealth, on June 23, 1876, made a contract by which the Commonwealth agreed to construct a reservoir near the hospital at Danvers at its sole expense and keep it in condition, and the town was to have the perpetual right to use the reservoir "as a storage basin for a supply of water to said town and to such other places as the town may hereafter desire." Upon the introduction of water to the reservoir by the town as agreed, the Commonwealth was to pay to the town $12,500 and annually thereafter for the term of twenty years the sum of $1,000 as full compensation for the supply of water for the hospital. At the expiration of the twenty years the Commonwealth and the town were to fix by mutual agreement the annual water rates thereafter to be paid by the Commonwealth. St. 1898, c. 564, provided that if the town and the trustees of the hospital should fail to agree as to the amount of compensation to be paid by the Commonwealth for water supplied by the town to the hospital under the contract, three commissioners should be appointed to determine the sum to be paid for such water each year from December 1, 1896, to December 1, 1899. On an award made by commissioners so appointed, it was *held*, that there was no error of law in a decision of the commissioners that the town was not entitled to charge the Commonwealth a profit on water consumed at the hospital, and that the Commonwealth should pay its share of the expenses actually incurred by the town in maintaining the whole system of waterworks, including extensions of distributing pipes. *Held, also*, that there was no error in a decision of the commissioners that no reduction was to be made from the sum awarded by the commissioners by reason of the payment of the $12,500 by the Commonwealth on the completion of the reservoir. *Selectmen of Danvers* v. *Commonwealth*, 502.
2. At a hearing before commissioners appointed under St. 1898, c. 564, to determine the amount to be paid by the Commonwealth to the town of Danvers for the use of water furnished to the Danvers lunatic hospital during a period named, under the contract between the Commonwealth and that town, evidence of the sums paid for water at the State prison and in other towns was held to have been excluded rightly. *Ibid.*

Liability of Commonwealth for interest from end of each year covered by award of commissioners under St. 1898, c. 564, for use of water furnished by town of Danvers to lunatic hospital, see INTEREST.
As to costs in proceedings before commissioners to determine compensation for water, see PRACTICE, CIVIL, 1.

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WATUPPA RESERVOIR COMPANY.

As to rights of flowage of, under its charter, see CORPORATION, 2.

WAY.

Continuing Trespass on Private Way.

1. A continuing interference with the plaintiff's right of passage over a private road entitles him to equitable relief, although he could maintain an action at law for the past trespasses. *Driscoll* v. *Smith*, 221.

Effect of Boundary on Private Way.

2. Where a grantor conveys land describing it as bounding on a certain street, which is a private road over land of the grantor, the grantee, in a suit in equity against his grantor to enjoin an obstruction of the road, may show that the street named in the deed extended to a certain highway at the time of the conveyance, by evidence of the existence and use of the road, of its being commonly known as the street named, and of acts and declarations of the defendant. *Driscoll* v. *Smith*, 221.
3. In a suit in equity, by a grantee of land described in his deed as bounding on a certain street, against his grantor, to enjoin the obstruction of a private road over land of the defendant, it appeared, that at the time of the conveyance the defendant had given to the private road the name of the street mentioned in the deed, that the road then led to a certain highway, that the defendant represented to the plaintiff and other persons that it was his intention to make this road a main thoroughfare leading to the highway, and that the defendant did work upon the road in fitting it for travel. *Held*, that this evidence, together with other evidence as to the extent to which the road was used, warranted a finding and ruling, that the defendant was estopped to deny that the street named in the deed extended to the highway. *Ibid.*

When Objection of Variance not open.

4. In an action of tort for the obstruction by a fence of a road over which the plaintiff claims a right of way, where by the bill of exceptions it is agreed, that if the plaintiff had a right of way over the road, the fence constituted such an obstruction of it as to support the declaration, it is not open to the defendant to contend that the plaintiff's evidence showed the building of a fence across the road at a point not included in the description of the road in the declaration. *McKenzie* v. *Gleason*, 452.

Public Way: Common Lands.

5. Even before St. 1875, c. 163, (R. L. c. 59, §§ 17, 18,) no right of the public could be acquired by prescription by passing and repassing over a portion of an open common. *McKay* v. *Reading*, 140.

Ancient Public Way.

6. On the issue of the existence of an ancient public way leading to a neck of land, United States coast survey charts are admissible to show the

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existence of a way without regard to the question of whether the way was public or private. *Clark* v. *Hull*, 164.

7. In an action for trespass to the plaintiff's close on a neck of land reached by a causeway, the defendant contended that at the time of the alleged trespass he was in the rightful use of a public way. Ancient records put in evidence showed that there was at the time of those records a highway over and beyond the causeway and that a gate across the causeway was put up to keep cattle in, there being evidence that it was maintained there only during the pasturage season and removed at other times. There was testimony of old men of a road reported to be ancient and of the use of this road from time immemorial by many persons under a claim of right and of repairs made by such persons and by the surveyor of the district, and that the way in controversy was identical with this ancient road. The jury found for the defendant. *Held*, that the verdict was justified, there being evidence to show a public way by prescription or dedication before the enactment of St. 1846, c. 203. *Ibid.*

Extent of Public Easement.

8. *Semble*, that the owner of land taken for a street holds it subject to the right of the Legislature to appropriate the space above and below the surface as well as upon it, in any reasonable way, for the purposes of public travel, without providing compensation. *Sears* v. *Crocker*, 586.

9. Under St. 1894, c. 548, and later statutes, the construction of the subway beneath the surface of Court Street and State Street in Boston imposes no additional easement on land owned by the abutters to the centre of those streets, and the Boston transit commissioners lawfully can construct such subways without taking in fee the land under the streets. *Ibid.*

Title in Subways.

10. The provision in St. 1902, c. 534, § 19, that the city of Boston "shall have, hold and enjoy in its private or proprietary capacity, for its own property," the several subways and the tunnel built and to be built under that and former statutes, gives a title to the subways and tunnel merely as structures, and confers on the city no ownership of the land lawfully occupied by those structures. *Sears* v. *Crocker*, 586.

Conduits for Wires under Streets.

11. An electric light company, using the streets of Boston for the support of its poles and wires under a license revocable by the public authorities, and required by St. 1894, c. 454, to put its wires underground under a like revocable license, holds such privileges in the streets subject to revocation by the Legislature. *Boston Electric Light Co.* v. *Terminal Co.* 566.

12. St. 1896, c. 516, providing for a south terminal station in Boston, does not violate the obligation of contracts in authorizing the taking of portions of certain streets containing conduits of the Boston Electric Light Company, incorporated under the general laws contained in Pub. Sts. c. 106. *Ibid.*

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Construction of Highway.

Order to widen public way gives no authority to any municipal officer to perform work or make contract for it without vote of city or town, see MUNICIPAL CORPORATIONS, 2.

Remedy for Damage from laying out of Highway.

13. An order laying out a street, made by a board having jurisdiction over the subject, cannot be attacked in an action of tort. If such an order is defective for want of sufficient notice to remove walls, fences and trees, the remedy is by certiorari. *Stowell* v. *Board of Public Works*, 416.

14. If an order laying out a street gives a landowner a reasonable time to remove his walls, fences and trees, and before that time has elapsed they are destroyed in the construction of the highway, the owner cannot recover for his loss in an action of tort, but only by a petition under the highway act for damages occasioned by the laying out of the street. *Ibid.*

Defect in Highway.

15. A town is not liable for an injury caused by an unsuitable bridge, outside of the travelled path of a highway, constructed across a gutter to connect a private way with the highway. *Felch* v. *West Brookfield*, 309.

16. In an action by a conductor of a street railway company against a town for injuries caused by an alleged defect in a highway, it appeared that the plaintiff, while attempting to pass around a superintendent standing on the running board of an open car, came in contact with a shade tree which was thirty-one inches from the body of the car and eighteen and one quarter inches from the outer edge of the running board. *Held*, that there was no evidence of negligence on the part of the town in failing to take measures to have the tree removed, and no evidence that the tree was a defect within the meaning of the statute. *Hall* v. *Wakefield*, 147.

17. In an action against a city for personal injuries from an alleged defect in a highway consisting of a water shut-off projecting above the travelled part of a sidewalk, the defendant, to show that a failure to remedy the alleged defect was not want of reasonable care, put in evidence, without objection, the number of miles of its streets, the value of its taxable property, the amount of money that could be raised by taxation and the amount appropriated and expended for highways. To meet this the plaintiff, on cross-examination of witnesses called by the defendant, showed that the shut-offs were taken care of by the water department and not by the highway department of the defendant and that the income of the water department exceeded its expenses. *Held*, that the evidence introduced on both sides was competent. *O'Brien* v. *Woburn*, 598.

Action for injuries from defect in highway consisting of pile of paving stones on edge of sidewalk, where only issue was in regard to plaintiff's due care, see NEGLIGENCE, 7.

As to negligence of city in leaving iron pipe on sidewalk, see MUNICIPAL CORPORATIONS, 6.

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WILL.

Soundness of Mind.

1. On the issue of the sanity of a testator, the contestant of the will contended that the testator was of unsound mind by reason of senile dementia, a progressive disease which continued to the time of his death. The will was executed in April, 1895. The testator died in September, 1898. The judge of the Superior Court, before whom the issues of fact were tried, fixed January 1, 1897, as the time up to which witnesses might testify in regard to the testator's appearance, conduct and apparent condition. No objection to this was made by either party. The contestant asked the attending physician of what disease the testator died. The judge excluded the question. *Held*, that the exclusion was right, and that it was not the duty of the judge to receive the evidence merely because an expert would testify that in his opinion it had some significance. *McCoy* v. *Jordan*, 575.

What questions permissible to witness not expert on issue of testator's soundness of mind, see EVIDENCE, 8–10.

Revocation by Marriage of Appointment by Will.

2. Under R. L. c. 135, § 9, excepting from revocation by marriage so much of a will as is made in the exercise of a power of appointment, unless the property thus disposed of would pass in default of appointment to the persons who would have been entitled to it if it had belonged to the donee of the power and he had died intestate, in a case where in default of such appointment a fractional part of the property appointed would have gone to the donee of the power, the exercise of the power by the will of the donee is revoked by marriage as to such fractional part and stands unrevoked as to the remaining portion of the property appointed. *Paine* v. *Price*, 350.
3. The question, whether an appointment by will is revoked by the marriage of the donee of the power, does not involve the validity of the will, and is not affected by a declaration concerning it in a decree of a probate court allowing the will. *Ibid.*

Provision void as attempt by testator to control property given absolutely, see DEVISE AND LEGACY, 2.

For construction of wills, evidence of attending circumstances, computation of income and abatement of legacies, see DEVISE AND LEGACY.

WITNESS.

Contradiction.

In accordance with the well settled practice of this Commonwealth, evidence may be introduced to contradict the testimony of a witness of the adverse party as to a conversation without having called the attention of the first witness to the conversation. *Sirk* v. *Emery*, 22.

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Witness (*continued*).

Qualification of Expert.

Qualification of expert as to bearing strength of wood, see EVIDENCE, 11.
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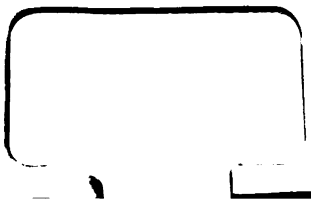
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